NO. 90-1185

In the
Supreme Court of the United States

OCTOBER TERM, 1990

DISTRICT 2 MARINE ENGINEERS BENEFICIAL ASSOCIATION, ASSOCIATED MARITIME OFFICERS, AFL-CIO AND PHILIP RITCHIE,
Petitioners

VERSUS

DELTA QUEEN STEAMBOAT COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a federal court may refuse to enforce an arbitration award under a collective bargaining agreement on the ground that the award exceeds the arbitrator's authority, where the arbitrator has considered past discipline meted out by the employer for similar or more egregious offenses (the "common law of the shop"), and has modified discipline based upon the employer's past inconsistent discipline, the collective bargaining agreement not expressly limiting the arbitrator's authority to do so.

TABLE OF CONTENTS

Questions Presented For Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutory Provision 2

Statement of the Case 2

Reasons for Granting the Writ 8

Conclusion 19

TABLE OF AUTHORITIES

Cases	Page
Bruno's, Inc. v. United Food & Commercial Workers International Union, 858 F.2d 1529 (11th Cir. 1988)	17
Container Products, Inc. v. Steel Workers, 873 F.2d 818 (5th Cir. 1989)	16,17
Delta Queen Steamboat Company v. District 2 Marine Engineers Beneficial Association, 889 F.2d 599 (5th Cir. No. 89-3084)	1,10
Electrical Workers Local 429 v. Toshiba America, Inc., 879 F.2d 208 (6th Cir. 1989)	17
Georgia-Pacific Corp. v. Paperworkers Local 27, 864 F.2d 940 (1st Cir. 1988)	10,11,12
W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983)	11
Gulf States Tel. Co. v. Elec. Wkrs. Local 1692, 416 F.2d 198, 202 (5th Cir. 1989)	10
Lynchburg Foundry Company v. Steelworkers, 404 F.2d 259, 261 (4th Cir. 1968)	9
Magnavox Company v. International Union of Electrical, Radio and Mach. Workers, 410 F.2d 388 (6th Cir. 1969)	12,13
Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977)	13
Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, 724 F.2d 1217, 1221-22 (6th Cir. 1984)	12
Northwest Airlines v. Airline Pilots Association, 633 F.Supp. 779, 785 (D.D.C. 1985), *rev'd*, 808 F.2d 76	10,13,16
Paperworkers v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L. Ed. 2d 286 (1987)	*passim*

TABLE OF AUTHORITIES (continued)

Cases **Page**

Smith v. Kerrville Bus, 709 F.2d 918 n.2 (5th Cir. 1983) 18

Stead Motors of Walnut Creek v. Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989) 11,16

Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 8,9,11,14,16

Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 8,9,10,11,14,16

Steelworkers v. Warrior Gulf & Navigation Co., 363 U.S. 574 (1960) 8,9,11,14,16,18

S.D. Warren Co. v. Paperworkers, 845 F.2d 3 (1st Cir. 1988). *cert. denied*, 109 S.Ct. 555 (1989), on remand from 108 S.Ct. 497, vacating 815 F.2d 178 (1st Cir. 1987),reversing 632 F.Supp. 463 (D. Me. 1986) 10,12

F.W. Woolworth Co. v. Teamsters Local 781, 629 F.2d 1204 (7th Cir. 1980) 10,15,16

STATUTES

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 2

28 U.S.C. §1254(1) 2

Inland Navigational Rules Act of 1980, 33 U.S.C. §2001 4

TREATISE

Elkouri and Elkouri, How Arbitration Works, 640 (BNA Books 4th Ed. 1985) 8,17

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Delta Queen Steamboat Company v. District 2 Marine Engineers Beneficial Association.* 889 F.2d 599 (5th Cir.No.89-3084;Dec.5,1989).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 889 F.2d 599, and is reprinted *infra* at App. A13 - A24. Four circuit judges dissented from the denial of the suggestion of rehearing en

banc (which the Court also treated as a petition for panel rehearing), and the denial and the dissent are printed *infra* at App. A1 - A12. The United States District Court for the Eastern District of Louisiana orally issued its reasons for judgment, which were transcribed and are printed *infra* at App. A26 - A33. The arbitrator's award at issue is unreported and is printed *infra* at App. A36 - A67.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 5, 1989 (App. A13 - A24). A timely petition for rehearing was denied on March 19, 1990 (App. A1 - A12). On June 6, 1990, Justice White signed an order extending the time for filing a petition for writ of certiorari to and including July 17, 1990 (App. A25). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185, provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Company (respondent) and the Union (peti-

tioner) were, at all times relevant here, parties to a collective bargaining agreement covering all masters, mates and pilots employed by the Company. The agreement provided that the company would not discharge employees without "proper cause" and contained a very broad grievance-arbitration provision, entitling the Union to take to arbitration "all complaints, disputes or grievances arising between the parties. . .relating to or in connection with or involving questions of interpretation or application of any clause of this Agreement or any acts, conduct or relations between the parties, directly or indirectly." The parties also appointed a permanent arbitrator who was expressly empowered to decide "all grievances, disputes, disagreements or controversies . . . relating to or involving the interpretation, construction, application or performance of any of the terms or conditions" of the agreement. The agreement further declared that "any grievance relating to a discharge shall be expedited and the matter shall be arbitrable" within 5 working days after the notification of the discharge.

On June 1, 1987, the Company discharged Captain Philip Ritchie, an employee covered by the agreement, who had an otherwise spotless work record covering 40 years in the merchant marine. At the time of his discharge, Ritchie was a pilot of the Mississippi Queen, a passenger excursion vessel owned and operated by the Company. The discharge letter stated:

> Enroute to Memphis on May 21, 1987 at about 7:00 a.m. you *overtook and passed* a tow boat in a hazardous stretch of the River. In doing so, you violated the applicable Rules of the Road. This act put the Mississippi Queen in danger. It compromised the safety of her passengers and

> crew. This is the cause of your termination (App. A47)[1] (emphasis in original).

While going up-river, Ritchie attempted to pass a tow boat pushing 34 barges while hazardous conditions existed on the river. The captain of the tow boat had not unequivocally given permission to Ritchie to pass. The Mississippi Queen lost headway because of the conditions on the river at the time, and its bow swung towards the barges. The Mississippi Queen's gang plank, which extends from the bow, passed within 15 feet of the barges. The Mississippi Queen made a full 360 degree turn and proceeded in its original direction of north bound on the Mississippi River. No injuries or damage to the vessel occurred.

A grievance was filed on June 2, 1987 and the matter proceeded to arbitration. In arbitration, the parties stipulated that the issue was "did the Company have proper cause to discharge Captain Philip Ritchie on May 29, 1987? If not, what is the proper remedy?"

Before the arbitrator, the Company contended that Ritchie was discharged in accordance with Article VI of the collective bargaining agreement, which in relevant part provides:

> No officer shall be discharged except for proper cause such as, but not limited to, inefficiency, insubordination, carelessness or disregard of the rules of the Company. . . Discharge cases shall be subject to the expedited grievance procedure. . . . (App. A47)

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1. The "Rules of the Road" are set forth in the Inland Navigational Rules Act of 1980, 33 U.S.C. §2001 *et seq.*

The Union countered that "proper cause" did not exist for several alternative reasons, chiefly that "proper cause" requires the application of Company rules and penalties in a non-discriminatory manner (App. A52 - A54).

The arbitrator sustained the Union's grievance. He found that Captain Ritchie violated the Rules of the Road and that he was guilty of "gross carelessness" by his violation of the applicable Rules of the Road, as contended by the Company. (App. A57). He also found, however, that "proper cause" requires consistent application of work place penalties for like offenses and concluded that proper cause did not exist because of the inconsistent manner in which the Company administered the work rule under which it discharged Captain Ritchie. (App. A63 - A66).

In reaching the conclusion of a lack of proper cause the arbitrator noted that no discipline had been imposed by the Company where a collision occurred between the Mississippi Queen and another vessel in December 1985, which caused in excess of $1,000,000 in damages. The Coast Guard investigation laid fault on the pilot of the Mississippi Queen, as did the National Transportation Safety Board.[2] (App. A63 - A64).

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2. The Coast Guard's report stated that the cause of the collision was "the failure of the pilot of the Mississippi Queen to take adequate precautions to keep clear of the Crimson Glory during an overtaking situation. Contributing causes of the casualty included excessive speed on the part of the Mississippi Queen, the failure of the pilot of the Mississippi Queen to correctly assess the effect of the strong river currents and eddies on his vessel." The NTSB found that "the probable cause of the collision between the Mississippi Queen and the Crimson Glory and its tow was the decision by the Mississippi Queen's pilot about 8 minutes before the collision to overtake the Crimson Glory at a sharp bend in the Mississippi River while the tow was crosswise in the river." (App. A63 - A64).

The arbitrator also considered an incident which occurred in the mid-1980's where no discipline was taken against either a Company pilot or master. The pilot or master of the Mississippi Queen navigated the Delta Queen, another passenger vessel owned and operated by the Company, through a lock on the Mississippi River and lost control of the vessel, resulting in damage to the Delta Queen. (App. A65).

A third incident considered by the arbitrator occurred on August 5, 1985, when a Company captain grounded the Delta Queen. The Company did not impose discipline for this accident. (App. A65).

Based on these occurrences, the arbitrator concluded that the Company did not strictly enforce its disciplinary rules. He further concluded that the foregoing incidents were "similar offenses" to the offense committed by Ritchie. Given Captain Ritchie's "good record with the Company and his forty years of Merchant Marine service free of discipline," the arbitrator decided that it was "unfair and unjust to impose the severe penalty of termination upon Captain Philip Ritchie while other responsible Pilots and Masters who are navigators have been guilty of similar offenses yet received no penalty. Because of this disparate treatment, the [a]rbitrator . . . concluded that discharge is too severe a penalty in this case." (App. A66). The arbitrator ordered the Company to immediately reinstate Captain Ritchie to full employment, with restoration of all lost seniority. He reduced Ritchie's entitlement to back pay to a period of six months, May 29 to November 30, 1987 (App. A67) however, thereby effectively reducing Captain Ritchie's discharge to an 8 month suspension without pay, as the award issued on August 4, 1988 (App. A67).

The Company refused to comply with the arbitration award, instead instituting this lawsuit against the Union under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, seeking an order vacating the arbitrator award. The parties filed cross motions for summary judgment and the District Court granted the Company's motion and vacated the arbitration award. In its oral reasons, the District Court held that "the contract in this case gives the employer the right to discharge in the event of carelessness," and that once carelessness was found by the arbitrator, he could not consider what the proper penalty should have been for the carelessness. (App. A27 - A28). It therefore determined that the discriminatory application of the work rule by the Company was improperly considered by the arbitrator.

The Court of Appeals affirmed. It reasoned that the agreement's "management rights" clause limited the authority of the arbitrator to determining whether a wrongful act was committed by the employee as contended by the Company, and if such an act was commited, divested him of the authority to modify the discipline or discharge.[3] (App. A23.) The Fifth Circuit determined that since the arbitrator found that Captain Ritchie had committed gross carelessness," the arbitrator improperly included the Company's past failure to discipline for similar or more egregious occurrences into the equation for determining proper cause, and his doing so warranted vacating the award. (App. A23 - A24).

The Fifth Circuit denied the petition for rehearing en

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3. The management rights provision relied upon by the Fifth Circuit states that "the right to discipline and discharge for proper cause are likewise the sole responsibility of the Company." (App. A17).

banc. Judge Williams, joined by Judges Politz, King and Johnson, dissented. In his lengthy dissent, Judge Williams reasoned that the provision of the management rights clause relied upon by the panel (quoted in footnote 3, *supra*), was a limitation upon the Company's right to discipline and discharge, and not a divestiture of authority from the arbitrator to consider discriminatory discipline and discharge. He noted that the Company agreed to arbitrate all "discharge *cases*" meaning that the entire case, including the penalty imposed, is submitted to arbitration (App. A5). Judge Williams opined that "one of the absolute fundamentals of the extensive common law of labor arbitration is that the arbitrator has authority to modify the amount of discipline unless. . .there is a specific denial of that right in the contract," and that holding that an arbitrator has no power to modify discipline unless the contract grants it specifically, as the Fifth Circuit did, is to "wipe out the common law of the industry and the shop as to such basic questions as to what constitutes just cause and the well-established principle of progressive discipline." (App. A6). He noted that "it is not all common for contracts to write in specific limitations upon the arbitrator's power over discipline," and the instant contract did not do so. (App. A8).

REASONS FOR GRANTING THE WRIT

According to the leading treatise on labor arbitration, a significant percentage of cases that reach arbitration involve discharge or disciplinary penalties assessed by management. Elkouri and Elkouri, *How Arbitration Works*, 640 (BNA Books 4th Ed. 1985). This Court's *Steelworkers Trilogy*, reaffirmed in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L. Ed.2d 286 (1987), establish the ground rules for judicial review of labor

arbitrator's decisions, and the arbitrator's authority.[4] "Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *Misco,* 108 S.Ct. at 372. "The labor arbitrator's source of law is not limited to the express provisions of the contract, as the industrial common law — the practice of the industry and the shop — is equally a part of the collective bargaining agreement." *Warrior & Gulf Navigation,* 363 U.S. at 581-82. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of its authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco,* 108 S.Ct. at 371.

The Fifth Circuit's decision is in irreconcilable conflict with the *Trilogy* and *Misco.* Joining what it termed an "emerging trend among other courts of appeals" (App. at A23), the court of appeals has held that once an arbitrator determines that a wrongful act has occurred, he has determined that just cause exists and has no authority to modify the penalty based upon prior inconsistent discipline, for this is not an integral element of determining whether the act was committed. The Fifth Circuit now implictly requires affirmative authority in the contract to modify employer discipline, contrary to *Enterprise Wheel* and *Misco.*[5]

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4. The *Steelworkers Triolgy* is *Steelworkers v. Enterprise Wheel and Car Corp.* 363 U.S. 593 (1960); *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960).

5. Shortly after the *Steelworkers Triolgy,* the Fourth Circuit held, relying upon *Enterprise Wheel,* that an arbitrator is free to reduce discipline, unless the "contract *expressly* forbade the arbitrator to exercise any discretion in fashioning this award." *Lynchburg Foundry Company v. Steelworkers,* 404 F.2d 259, 261 (4th Cir. 1968). The Fifth Circuit

In *Enterprise Wheel*, 10 employees left their jobs in protest over the discharge of a fellow employee. "The arbitrator found that the discharge of the men was not justified, though their conduct, he said, was improper. In his view, the facts warranted at most a suspension of the men for 10 days each." 363 U.S. at 595. This Court ordered the arbitrator's award enforced, stating an arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is expecially true when it comes to formulating remedies." 363 U.S. at 597.

With *Delta Queen*, the Fifth Circuit joins the First Circuit in rejecting, post-*Misco*, the authority of arbitrators to reduce discipline by applying the common law of the shop, through judicial interpretation of the managements rights and discipline provisions of agreements. *Georgia-Pacific Corp. v. Paperworkers Local 27*, 864 F.2d 940 (1st Cir. 1988); *S.D. Warren Co. v. Paperworkers*, 845 F.2d 3 (1st Cir. 1988), *cert. denied* 109 S.Ct. 555 (1989), *on remand from* 108 S.Ct. 497, *vacating* 815 F.2d 178 (1st Cir. 1987), *reversing* 632 F.Supp. 463 (D. Me. 1986). The District of Columbia and the Seventh Circuits have not joined in this "emerging trend." *Northwest Airlines v. Air Line Pilots Ass'n.*, 808 F.2d 76 (D.C. Cir. 1987); *F.W. Woolworth Co. v. Teamsters Local 781*, 629 F.2d 1204 (7th Cir. 1980). Under the views expressed by the District of Columbia and Seventh Circuits, the arbitration

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Footnote 5 continued.

initially accepted this expression, *Gulf States Tel. Co. v. Elec. Wkrs. Local 1692*, 416 F.2d 198, 202 (5th Cir. 1969) but *Delta Queen* unequivocally abandons it.

award in the instant case would *not* have been vacated.[6]

In *Georgia-Pacific*, the arbitrator concluded that an employee had engaged in dishonesty, for which the employer had discharged him. The arbitrator reduced the discharge to a suspension, noting that "just cause" requires an inquiry first into whether misconduct occurred, and second, whether there are countervailing factors which mitigate the penalty, such as the employee's "clean" work record. 864 F.2d at 943. The First Court disagreed, however, finding "a patent example of arbitral excess." 864 F.2d at 945. In its view, "just cause" is "but one ground for discharge that is to be considered independently of the other enumerated grounds for discharge," that is, did the act occur as charged? It took the arbitrator to task for concluding that he possessed the "normal authority" to mitigate discipline, ascribing to him "*Alice in*

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[6] The Ninth Circuit implicitly agreed with the District of Columbia and Seventh Circuits in *Stead Motors of Walnut Creek v. Machinists Lodge No. 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*). In *Stead*, the discharge of an automatic mechanic who failed to adequately secure lug bolts on the wheel of a car he serviced was reduced to suspension by the arbitrator. This contract too had a list of immediate causes for discharge, which covered the mechanic's conduct, but the arbitrator found mitigating circumstances.

Although the case involves the application of "public policy" as a basis to vacate arbitral decision, *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), the *en banc* court rejected the notion that there is a public policy against reinstating an individual who has committed a wrongful act, whether it be a truck driver who "receives a speeding ticket while driving the company truck, or even an inventory clerk who commits a single act of petty theft." 886 F.2d at 1215. It reasoned that this approach would establish the judiciary as the determiner of whether reinstatement is appropriate, which violates "the teachings of *Misco*, the *Steelworkers Trilogy* and the thirty years of cases in between." 886 F.2d 1216-17, n.16. With the approach utilized by the Fifth Circuit post-*Misco*, the issue will seldom be reached, for it holds an arbitrator cannot consider reduction of a penalty.

Wonderland" reasoning, and requiring an affirmative contractural grant of such authority. 864 F.2d at 945-46. It concluded that non-specific boiler-plate language in the "causes for discharge" article divested him of authority to change the penalty, substituting its judgment for the arbitrator's.[7]

In *S.D. Warren*, the arbitrator found that employees had violated the work rule which had resulted in their being discharged, but reduced the discharges to suspensions. Like the contracts in *Georgia-Pacific* and *Misco*, "causes for discharge" were provided in the contract. As in the instant case, management retained the "sole right to . . . discharge employees for cause." 815 F.2d at 180. The arbitrator concluded that the heading, "causes for discharge," did not equate into "proper cause," as the rule thereunder did not require discharge as the only penalty for the infractions enumerated, and she therefore had the inherent authority to consider mitigating circumstances as a part of the inquiry into whether "proper cause" existed. 815 F.2d at 181; 845 F.2d at 8. The First Circuit disagreed, stating the foregoing provisions remove the discretion of the arbitrator to consider anything other than whether the act triggering discipline occurred. 845 F.2d at 8.[8]

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[7] The contract provision provided in pertinent part:

> Any employee may be discharged for just cause. Without limiting the generality of the foregoing some of the causes for immediate discharge are. . . .
>
> (864 F.2d at 942).

[8] The Sixth and Tenth Circuits have also, prior to *Misco*, refused to enforce arbitrators' awards which reduce discipline or discharge penalties based on their respective interpretations of management rights clauses and disciplinary provisions of the collective bargaining agreements. *Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217, 1221-22 (6th Cir. 1984)(gathering cases to this effect); *Magnavox Company v. International Union of Electrical, Radio*

In conflict is the result in *Northwest Airlines*, where a pilot was discharged after he was discovered piloting a flight within 24 hours after consuming alcohol. Northwest prohibits crew members from using alcoholic beverages during the 24 hour period immediately preceeding the departure time of a flight to which that person has been assigned, and violation of the rule "shall constitute sufficient cause for discharge."[9] The Company's manual also made clear that alcoholic employees who violated this company rule may be treated differently from employees with a history of alcoholism who voluntarily sought treatment without violating company rules, stating "an employee's alcoholism or chemical dependency will be no defense to a proven violation of company rules." 633 F.Supp. at 785. The System Adjustment Board had Jurisdiction "over disputes between any employee . . . and the Company growing out of grievances or out of interpretation or application of any of the terms of the Agreement" 633 F.Supp. at 792. At arbitration, the employee admitted violating the rule, but contended the discharge "was without just cause because his admitted rule violation was the unavoidable consequence" of alcoholism, and that his rehabilitation from alcoholism justified reinstatement to active duty. 633 F.Supp. at 779. The System Board agreed that the employee had violated the rule, but because the employee was suffering from alcoholsim, the discharge was not for just cause. 633 F.Supp. at 784. The System Board ordered the employee prospectively reinstated, subject to certifica-

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(footnote 8 continued)

and Mach. Workers, 410 F.2d 388 (6th Cir. 1969); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977). In the instant case, the Fifth Circuit relied upon *Magnavox*, for precedent supporting its right to reconstrue the agreement against the arbitrator's award.

[9] *Northwest Airlines v. Airline Pilots Association*, 633 F.Supp. 779, 785 (D.D.C. 1985), *rev'd*, 808 F.2d 76.

tion that he had been rehabilitated from his alcoholism. 633 F.Supp. at 784.

The District Court vacated the arbitrator's award, on the same ground the Fifth Circuit employed herein. It concluded that once it was determined the employee had committed the act and that the Company rule was valid, just cause existed and the Board was without further authority to reduce the penalty. 633 F.Supp. at 791-792. In reversing, the circuit court concluded that the foregoing cited "just cause" and arbitration provisions made it "absolutely clear . . . that an unresolved grievance claiming the absence of 'just cause' with respect to a disciplinary action" is a dispute within the jurisdiction of the Board. 808 F.2d at 81. It also came to the "inescapable" conclusion that:

> the Board acted within its authority considering [the pilot's] claim that he had been fired without "just cause." And in reviewing this grievance, it is equally plain that the Board was authorized to judge the legitimacy of the disciplinary penalty imposed in light of mitigating circumstances. This is hardly surprising because "[a]rbitral determination not only of the existence of misconduct but of the fitness of the punishment is routinely grist for the arbitral mill", [citation omitted]. (808 F.2d at 81-2).

Indeed, the appeals court emphasized that it saw "nothing" in the agreement precluding the System Board from reducing the penalty, and opined that there was "no conceivable way to construe the parties' agreement as removing from the Board's jurisdiction disciplinary actions related to alleged breaches of the 24-hour rule." 808 F.2d at 81-82. Echoing the *Steelworkers Trilogy*, it concluded that such questions were left to the arbitrator. 808

F.2d at 82.

In *F.W. Woolworth*, the Seventh Circuit was faced with three employees who were discharged. The arbitrator concluded that all of the grievants were guilty of a "technical violation" of the rule relied upon by the company. Although the contract stated that any "[v]iolation of any Company rule shall be considered a just cause [for discharge]" 629 F.2d at 1207, the arbitrator did not read this language literally, for as the Court noted, it is questionable "whether on its face such a sweepingly broad statement of principle could rationally be read with entire literalness." 629 F.2d at 1214-15. n.8. The appeals court found that the discharge for cause language was arguably ambiguous, and approved of the arbitrator's examination of "the body of industrial law" to resolve the ambiguity in favor of the employees. 629 F.2d at 1215. It also found that the arbitrator's reduction of the discharge was appropriate based upon the Company's past practice in enforcing its own rule contrary to the express terms. 629 F.2d at 1214, n.7 and 1216.[10]

In the instant case, the Court of Appeals refused to enforce the arbitrator's award based solely on the arbitrator's reliance upon the common law of the shop in determining whether proper cause existed in this workplace -- i.e., the Company's past failure to discipline employees who had engaged in similar or more egregious conduct than Captain Ritchie. Indeed, the Court of Appeals acknowledged that "the arbitrator found 'gross

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[10] The District Court held that once the arbitrator found that the wrongful act occurred as alleged by the Company, a finding of just cause was mandated, and therefore the arbitrator could not reduce the penalty or make further inquiry. The dissent agreed with this approach. 629 F.2d at 1204-05.

carelessness' without finding 'proper cause' for discipline," but concluded that "just cause" has no "talismanic significance;" it "simply . . . defines the many unrelated, independent acts that serve as grounds for employee discipline." (App. A23-A24). "Thus, where an arbitrator fails to make an express finding of proper cause, he nevertheless will be so bound if he finds that the employee committed certain underlying acts that constitute proper cause under the collective bargaining agreement." (App. A24). This narrow view is contrary to *Misco* and the *Trilogy*, and as Judge Williams notes in his dissent to the denial of rehearing en banc, "this holding effectively wipes out the common law of the industry and the shop as to what constitutes just cause and the well-established principle of progressive discipline." (App. A7).[11]

It is axiomatic, of course, that the parties are free to limit the discretion of the arbitrator to formulate a remedy. *Misco*, 108 S.Ct. at 372. But there was no express limitation in the instant collective bargaining agreement, as compared to the express limitations contained in the contract considered by the court of appeals in *Container Products, Inc. v. Steel Workers*, 873 F.2d 818 (5th Cir. 1989). There, the agreement provided that "should it be determined by the arbitrator that an employee has been suspended or discharged for proper cause therefor, the arbitrator shall

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[11] The contract provision upon which the Company relied in discharging Captain Ritchie differed little from the provision before the Court in *Misco*, and before the circuit courts in *Northwest Airlines*, *F.W. Woolworth* and *Stead Motors*. As in *Misco*, the instant provision merely presented a list of acts which might constitute "proper cause," but does not in any way constrain the arbitrator from interpreting the phrase "proper cause" to include, as this Court authorized in *Enterprise Wheel*, the element of discriminatory enforcement of its rules. The arbitrator did not find "proper cause" for discharge, as he believed there was none, hence his order of reinstatement.

not have jurisdiction to modify the degree of discipline imposed by the Company." 873 F.2d at 818-19. This provision unequivocally divested the arbitrator of jurisdiction once he determined the wrongful act had occurred. But the Fifth Circuit extended the holding of *Container Products* to the instant matter, although no similar language appeared, relying upon *Bruno's, Inc. v. United Food & Commercial Workers International Union*, 858 F.2d 1529 (11th Cir. 1988) and *Electrical Workers Local 429 v. Toshiba America, Inc.*, 879 F.2d 208 (6th Cir. 1989). In each of these cases, however, express language prohibited the arbitrator from mitigating the employers' actions.[12]

Not only was the arbitrator's approach consistent with the practice sanctioned by this Court in *Misco* and *Enterprise Wheel*, it is in accord with the widespread practice of arbitrators everywhere. As stated in the leading handbook on labor arbitration, "[i]t is generally accepted that enforcement of rules and asessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis esists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees)." Elkouri and Elkouri, *How Arbitration Works*, 684 (4th Ed.

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[12] In *Bruno's*, the arbitrator set aside an employer's disciplinary rule as unreasonable, which he had the authority to do under the contract, and an employee's discharge based upon it. The arbitrator took the extra step of formulating a rule to replace the invalid rule, notwithstanding language in the contract which gave the employer "the right to establish and maintain reasonable rules." 858 F.2d at 1532. In *Toshiba America*, the contract provided that "any disciplinary action, including discharge . . . shall not be altered or amended in the grievance and arbitration procedures." 879 F.2d at 210.

1985).[13]

As Judge Williams states in dissent, the effect of the panel's decision is to undermine the finality of arbitration, which has been encourged as our national labor policy, 29 U.S.C. §173(d), by narrowing "just cause" to a formulistic application. Contrary to the Fifth, First, Sixth and Tenth Circuits holdings, just cause is not a narrow question of whether an act occurred. It requires, at times, consideration of the common law of the shop, "which implements and furnishes the context of the agreement." *Warrior & Gulf,* 363 U.S. at 580. The "emerging trend"manifested in this case invites a losing party to resist acceptance of the award and, under the guise of an attack on the arbitrator's authority, to permit the judiciary to intervene in arbitrable awards and to set them aside. Whether a given arbitrator's award which mitigates discipline will be set aside now depends upon the circuit in which the matter arises and the Court's interpretation of the agreement and its just cause provisions, rather than the arbitrator's. Since these cases exist in every circuit and present a recurring issue under §301, review is warranted by this court. The extent to which the court below has gone in the instant case (refusing to enforce an arbitrator's award because of his reliance upon the common law of the shop), inevitably serves as a signal that a broad degree of judicial creativity is available to those who resist compliance with arbitration awards. As Judge Williams states, this invitaion will not go unheeded.

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[13] In *Misco,* 108 S.Ct. at 371, this Court reviewed Elkouri with favor to determine if the arbitrator's award was in line with other arbitrator's awards. Even the Fifth Circuit has acknowledged that arbitrator's awards are reliable indicators of the common law of the shop. *See Smith v. Kerrville Bus,* 709 F.2d 918 n.2 (5th Cir. 1983).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX A

The DELTA QUEEN STEAMBOAT COMPANY,
Plaintiff-Appellee,

v.

DISTRICT 2 MARINE ENGINEERS BENEFICIAL ASSOCIATION, Associated Maritime Officers, AFL-CIO, and Philip Ritchie,
Defendants-Appellants.

No. 89-3084.

United States Court of Appeals,
Fifth Circuit.

March 19, 1990.

Appeal from the United States District Court for the Eastern District of Louisiana; Adrian G. Duplantier, Judge.

ON SUGGESTION FOR
REHEARING EN BANC

(Opinion Dec. 5, 5th Cir., 1989,
889 F.2d 599)

Before DAVIS, and SMITH, Circuit Judges, and LITTLE,* District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED.

The judges in regular active service of this court having been polled at the request of one of said judges, and a majority of said judges not having vote in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

JERRE S. WILLIAMS, Circuit Judge, with whom POLITZ, KING, and JOHNSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I must dissent from the failure of the Court to consider this case en banc to rectify the fundamental error of the panel opinion. *Delta Queen Steamboat Co. v. Dist. 2 Marine Engineers Beneficial Assn, AFL-CIO,* 889 F.2d 599 (5th Cir.1989). The panel opinion constitutes a significant and regrettable departure from the well-established law of this Circuit, and of the entire country, on deference to labor arbitration awards. The panel held that the arbitrator had no power under the collective contract to reinstate an employee discharged for what the arbitrator found to be "gross carelessness". I can only conclude that an intense disagreement with the arbitrator's reinstatement decision by the panel has led it to decide that the arbitrator departed from the contract in reaching that decision.

The last time a panel of this Court under-took to intrude itself deeply into the decision making process of the arbitrator, contrary to the well-established nation-wide law, our Court's decision was unanimously reversed by the United States Supreme Court. *United Paperworkers Intl*

Union, AFL-CIO V. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). I had hoped that this Court had learned from that reversal, and I assumed that it had after our broad and effective opinion in *Dixie Machine Welding Metal Works, Inc. v. Intl Bro. of Boilermakers, Etc.*, 867 F.2d 250, 252 (5th Cir. 1989), which recognized the sweep of the *Misco* decision.

In *Delta Queen*, Captain Ritchie, a 40 year veteran of the Merchant Marine, was discharged as pilot for causing a near-collision of his vessel, the MISSISSIPPI QUEEN, with some barges. His discharge by the company was submitted to the grievance and arbitration process. The arbitrator found that he had been "grossly careless". But he required reinstatement of Captain Ritchie on the ground that the discharge was discriminatory because there had been several other instances where pilots of this company had actually caused accidents, in one case resulting in damages of over a million dollars, and had nevertheless been reinstated. The discriminatory discharge, coupled with the fact that Ritchie had an outstanding record of 40 years, persuaded the arbitrator that he should be reinstated with seniority and some loss of back pay.[1]

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1. The panel opinion did not evaluate the merits of the mitigation of punishment because it found a lack of authority. On this question, suffice it to say that it is well-established that if the arbitrator has the right to review the punishment, disparate or discriminatory punishment is firmly established as a proper consideration.

The company urged that the other instances to which the arbitrator referred were not comparable because the contract wording had been changed. It had, but it requires reading a clearly disjunctive phrase as conjunctive for the change to have any possible effect on this case.

In any event, the comparability of the earlier instance was clearly a matter for the arbitrator, not the courts.

The panel opinion found that the arbitrator was in error in altering the discipline awarded by the company because the contract denied him that power. This conclusion was manifestly in error.

The starting point for applying the contract in this case is a provision of the Management Rights clause, which reads: "The right to discipline and discharge for proper cause are likewise the sole responsibility of the company." If these words are interpreted literally, they mean that no grievance or arbitration process at all can be applicable in any discharge or discipline case. But this provision is in a Management Rights clause which by well-established understanding undertakes to state absolute rights of management which are then subjected to being pared down by subsequent contract provisions. It is as if this provision read: "The right to discipline and discharge for proper cause is the sole responsibility of the company, subject to the limitations later stated in this agreement."

The panel opinion properly recognized limitations upon this language because the later contract provisions concerning the grievance procedure and arbitration clearly withdraw discipline and discharge for proper cause from the sole responsibility of management. The panel concluded that the issue of "proper cause" was submitted to the grievance procedure and arbitration, but the issue of discipline was not. There are no contract words justifying this distinction. At best, the provision is ambiguous. The critical contract provision which establishes that the Management Rights clause cannot be literally interpreted as read, is a provision in the grievance and arbitration clause of the contract that provides: "No Officer shall be discharged except for proper cause such as but not limited to inefficiency, insubordination, carelessness, or disregard of the rules of the Company. . . . Discharge cases shall be

subject to the expedited grievance procedure outlined in Article 13."

What is totally ignored by the panel in this provision and yet is critical to its interpretation is the fact that it provides in so many words that the "discharge case" is subject to the grievance procedure. "Case" means "case", not part of the case, as the panel urges. It would have been easy indeed, if the parties meant it, for that provision to have read: "The issue of proper cause in discharge cases shall be subject to the expedited grievance procedure. . . ." Instead, the contract in terms submits the entire case to the grievance and arbitration procedure.

Further, the breadth of this provision is supported and reinforced by another contract provision in the grievance/arbitration section of the contract which reads that the parties agree to: "*arbitrate* all complaints, disputes, or grievances arising between the parties . . . relating to or in connection with or involving questions of interpretation or *application of any* clause of this agreement or any acts, conduct or relations between the parties, directly or indirectly. . . ." (emphasis added).

The panel opinion relies heavily upon our decision in *Container Products, Inc. v. United Steelworkers,* 873 F.2d 818 (5th Cir.1989). Indeed, the panel says that the decision in *Delta Queen* is controlled by the *Container Products* case. Yet in stark contrast to *Delta Queen, the Container Products* case contained a specific and literal contract provision which denied to the arbitrator the power to evaluate discipline. The words are: "Should it be determined by the arbitrator that an employee has been suspended or discharged for proper cause therefor the arbitrator shall not have jurisdiction to modify the degree of discipline imposed by the company." 873 F.2d at 818. That provision is

completely unambiguous and must be accepted in its precise terms. There is no analogous provision in the *Delta Queen* contract. It does not say that "proper cause" shall be submitted to the grievance and arbitration procedure, it says that the "discharge *case*" shall be submitted to the grievance procedure and arbitration. "Case" obviously includes the whole case—proper cause and also discipline.

One of the absolute fundamentals of the extensive common law of labor arbitration is that the arbitrator has authority to modify the amount of discipline unless, as in Container Products, there is a specific denial of that right in the contract. There is no need to undertake a long string citation of cases which establish this proposition. This Court made it clear in the opinion by Judge Brown, *Gulf Co. v. Local 1692, IBEW,* 416 F.2d 198, 202 n. 10 (5th Cir.1969), when we said, "Arbitral determination not only of the existence of misconduct but of the fitness of punishment is routinely grist for the arbitral mill." Lest it be felt that this view is outmoded, this case was cited and the statement quoted with approval in *Northwest Airlines v. Air Line Pilots,* 808 F.2d 76, 81 n. 25 (D.C.Cir.1987).

The principle is confirmed in the texts on labor arbitration. Thus, one of the basic texts is cited by the Supreme Court in *Misco,* 108 S.Ct. at 371 n.8. It is Elkonri and Elkonri, How Arbitration Works (1973). At p. 628 it says: "Where the agreement fails to deal with the matter [of modifying penalties] the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in his power to decide the sufficiency of cause."

Similar comment is found in Hill & Sinicro, Remedies in Arbitration (1981), at p. 101: "Before arbitrators will recognize such limitation [on the power to modify

discipline], however, the agreement must contain clear language that the arbitrator is not to have discretion to reduce a penalty." The book then goes on to say that a contract provision prohibiting an arbitrator from "modifying, amending, adding to, or subtracting from" the agreement does not constitute such specific wording to limit the arbitrator's authority to modfy discipline.

To the contrary is, e.g. *S.D. Warren Co. v. Paperworkers*, 815 F.2d 178 (1st Cir. 1987), which held the arbitrator has no such power to modify the discipline unless the contract grants it specifically. This view is strongly criticized as unrealistic by Judge Reinhardt of the U.S. Court of Appeals, Ninth Circuit. Speaking before the 40th annual meeting of the National Academy of Arbitrators, he called the doctrine a "dangerous principle" because it would make Management Rights clauses absolute except for detailed exceptions which must cover every conceivable contingency.[2] In effect this requirement would wipe out the common law of the industry and the shop[3] as to such basic questions as to what constitutes just cause and the well-established principle of progressive discipline.

It is true that some court cases in the 1970s and 1980s, as did *S.D. Warren* decided before *Misco*), began to develop principles of broader review of arbitration decisions, some even equating such review with the scope of review of district court decisions by the Courts of Appeals.

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2. National Academy of Arbitrators, 40th Annual Meeting volume, Arbitration 1987, p. 37 (1987).

3. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960).

Some of the courts were moving away from the "trilogy"[4] cases believing they protected the arbitration process too broadly. But those cases went "by the boards" when the Supreme Court handed down *Misco*. In that case the Court made clear it was confirming the basic law of the "trilogy" by citing those cases with approval, referring to the common law of the shop, and defining and emphasizing the narrowness of judicial review.

It is not at all common for contracts to write in specific limitation upon the arbitrator's power over discipline. Thus, as the Supreme Court in *Misco* taught us: "Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." 108 S.Ct. at 372. In *Enterprise Wheel*, one of the "trilogy", for example, the arbitrator reduced the disipline from discharge to a ten day suspension. The Court of Appeals refused to enforce the award, but the Supreme Court reversed explaining that although the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.* 365 U.S. at 597, 80 S.Ct. at 1361 (emphasis added)." Then the Court went on to state that the parties can, of course, limit the discretion of the arbitrator. But the contract in *Delta Queen* did not do so, as it had done specifically in *Container Products.*

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4. The "trilogy" is well known in labor law. It consists of three cases decided the same day by the Supreme Court. Together, they outlined in detail the law governing labor arbitration and the role of the court. They are: *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)

One of the cases in the "trilogy" stated the controlling principle clearly and succinctly. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584, 80 S.Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960). The Court said: "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

The ultimate controlling principle in this case is that this Court had no right to interpret the contract to forbid the arbitrator the power to mitigate the discipline because, at best, the contract is ambiguous. *Misco* made clear that the inquiry is not what the court decides that the contract provides. It is whether the arbitrator's interpretation is a reasonable one, not whether it is the "right" one.

Thus, the Court did not follow the well-established law which the Supreme Court spelled out in detail and directed at this Court and other courts in the 1987 *Misco* opinion. After noting what the law is by this most recent comprehensive statement by the United States Supreme Court, I am at a total loss to understand the Court's failure en banc to correct the error of the panel in *Delta Queen*. Two specific quotations from *Misco* should suffice to show the Court's error. They summarize effectively the law as I have stated it. Further, they show that the Supreme Court was bringing to a halt the possible trend to broaden the scope of judicial power. The quotations are:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the *meaning of the contract*

> that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

108 S.Ct. at 370.

> The arbitrator may not ignore the plain language of the contract, but the parties have authorized the arbitrator to give meaning to the language of the agreement. A court should not reject the award on the ground that the arbitrator misread the contract. . . . Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. As the court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is *even arguably construing* or applying *the contract* and acting within the scope of its authority, that a court is convinced he committed serious error does not suffice to overturn his decision. (emphasis added).

108 S.Ct. at 371.

These authoritative statements of the governing law show why I must challenge the panel in its opinion. In the light of the contract wording it is inescapable that the arbitrator was "*arguably* construing or applying the contract and acting within the scope of its authority. . . ." Instead,

the panel uses the "jurisdiction" or "non-arbitrability" rubric to paper over the fact that the issue was one of contract interpretation and application. It is a common claim but rarely accepted by arbitrators and, fortunately, the courts, that an asserted incorrect interpretation of the contract means that the arbitrator exceeded his or her jurisdiction. As Judge Brown with prescient wisdom said in *Gulf States Telephone Co.*, 416 F.2d at 201. An employer "as an almost automatic instinctive reflex to an adverse award on the merits assert[s] the Gemini attack of lack of the arbitrator's 'authority' to decide as he did." This is the error into which the Court in *Delta Queen* falls. It is obviously not within the ken of the law as authoritatively stated by the United States Supreme Court in *Misco*. Must I remind that the Supreme Court unanimously reversed this Court once before when we tried to intrude in the arbitration process once before.

All of the courts went through a period some years ago, before the trilogy, in which they kept throwing out arbitrator's awards when they did not agree with them on the ground that the arbitrators were not applying the contract and therefore lacked jurisdiction. The analysis was, in effect: "We reasonable judges can see that if one reads and applies this contract carefully one will not come out that way." That kind of judicial intrusion in the arbitration process has been effectively quieted by the principles the Supreme Court has given us in the earlier trilogy cases and now in the *Misco* case in Justice White's confirmation of those cases which he coupled with a careful outline of the stringent limitations upon judicial review of arbitration. No matter if we feel the arbitrator's decision is seriously faulted, we have no right to interfere with it.

I find it particularly disturbing that in the current widespread emphasis upon the importance of encouraging

Alternative Dispute Resolution (ADR) that this Court in *Delta Queen* is turning its back on a developed and effective ADR procedure which has saved and is saving courts and parties untold time and expense. Instead, *Delta Queen* is sending a signal to companies that lose labor arbitrations which says: "Come to us! If we think the interpretation of your contract is wrong even though the provision is ambiguous, we will find for you that the arbitrator exceeded his jurisdiction and set his award aside." It is because *Delta Queen* sends this reversionary signal loud and clear, I am constrained to file this dissent from the denial of a rehearing en banc.

APPENDIX B

The DELTA QUEEN STEAMBOAT COMPANY,
Plaintiff-Appellee,

v.

DISTRICT 2 MARINE ENGINEERS AND BENEFICIAL ASSOCIATION, ASSOCIATED MARITIME OFFICERS AFL-CIO and Philip Ritchie
Defendants-Appellants.

No. 89-3084

United States Court of Appeals,

Fifth Circuit.

Dec. 5, 1989.

A riverboat captain was terminated by his employer as a consequence of a near collision between a commercial passenger vessel and a tow of river barges. Union filed a grievance with the company, and the matter proceeded to arbitration pursuant to the applicable collective bargaining agreement. The arbitrator found that captain was grossly careless, but entered an award requiring captain's reinstatement. Employer appealed. The United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., granted summary judgment for employer, vacating the arbitrator's decision to reinstate captain, and union appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that the arbitrator's finding of gross carelessness precluded its order of reinstatement.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

JERRY E. SMITH, Circuit Judge:

This labor arbitration dispute arose as a consequence of a near collision between a commercial passenger vessel and a tow of river barges while navigating upstream through a dangerous channel of the Mississippi River. We are asked to decide whether a labor arbitrator exceeded his contractual authority by ordering the reinstatement to full employment of the responsible riverboat captain. Concluding that the district court properly vacated that portion of the arbitrator's award requiring reinstatement, we affirm.

I.

Captain Philip Ritchie, a forty-year veteran of the merchant marine service, joined the crew of the MISSISSIPPI QUEEN on April 24, 1987, to serve as a pilot. The Delta Queen Steamboat Company ("Delta Queen") owned and operated several passenger excursion vessels, including the MISSISSIPPI QUEEN, upon the Mississippi River. One month after joining the crew, Ritchie was piloting the MISSISSIPPI QUEEN north toward Memphis with over 350 passengers on board. Near a location known as Mason's Landing, sandbars reduced navigable lanes to a choke-point. The current through the channel was swift, making navigation hazardous.

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1. District Judge of the Western District of Louisiana, sitting by designation.

Northbound traffic stalled behind a large tow of barges attached to the towboat HARRY MACK, which, piloted by Captain Clark, was hauling a tow of 34 barges, 1,400 feet in length and 210 feet in width. Captain Clark was unable to force his tow through the chokepoint against the swift currents; when the MISSISSIPPI QUEEN arrived near Mason's Landing, the HARRY MACK was awaiting the assistance of other towboats to provide additional power.

Ritchie radioed the HARRY MACK, seeking permission, as required by the inland navigational rules, to overtake the barges.[2] Clark informed Ritchie that his position in the narrow channel was unstable and that it would be unsafe for the MISSISSIPPI QUEEN to overtake the barges. However, pressured by time, Ritchie elected to attempt a port-side pass without the express permission of the HARRY MACK.

Under full power, the MISSISSIPPI QUEEN lost headway in the swift current. The situation degenerated quickly as Ritchie lost complete control of the vessel and spun toward the barges. Ritchie sounded the danger signal, whereupon Clark reversed his engines. The bow of the MISSISSIPPI QUEEN, caught in a 360-degree spin, missed colliding with the barges by only about fifteen feet; Ritchie finally regained control downstream in calmer water.

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2. Rule 13 of the Inland Navigational Rules Act of 1980. 33 U.S.C. § 2013(a), for example, provides that "any vessel overtaking any other shall keep out of the way of the vessel being overtaken." Rule 9, *id.* § 2009(c)(i), provides that "[i]n a narrow channel or fairway when overtaking, the vessel intending to overtake shall indicate her intention by sounding the appropriate signal prescribed in Rule 34(c) and take steps to permit safe passing. The overtaken vessel, if in agreement, shall sound the same signal. If in doubt she shall sound the danger signal . . . ."

No damage or injuries were reported. Ritchie continued to serve his rotations as pilot until the MISSISSIPPI QUEEN's return, about eight days later, to its homeport in New Orleans.

There, a Delta Queen representative informed Ritchie that his employment with the company was being terminated because of the near miss. This verbal notice was confirmed in writing shortly thereafter.[3] The Marine Employees Beneficial Association, District 2 ("the union"), filed a grievance with the company on behalf of Ritchie the following day, and the matter proceeded to arbitration pursuant to the applicable collective bargaining agreement.[4]

The company maintained that Ritchie was discharged in accordance with article VI of the collective bargaining agreement, which in relevant part provides, "No Officer shall be discharged except for *proper cause* such as, but not limited to, inefficiency, insubordination, *carelessness,* or disregard of the rules of the Company" (emphasis added). The arbitrator found that Ritchie was indeed "grossly careless" in his professional judgment but also concluded

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3. The company's June 1, 1987, termination letter provided as follows: "Enroute to Memphis on May 21, 1987 at about 7:00 AM you *overtook and passed* a towboat in a hazardous stretch of the river. In doing so, you violated the applicable Rules of the Road. This act put the Mississippi Queen in danger. It compromised the safety of her passengers and crew. This is the cause of your termination;" (emphasis in original).

4. The collective bargaining agreement that applies in this case became effective on July 1, 1986, and expired on March 1, 1988. For reasons unknown, the arbitrator cited language from an earlier agreement that expired on April 1, 1986—one year prior to the relevant events of this case. The confusion is irrelevant, as Ritchie's conduct was egregious enough to be "grossly careless" and thereby "proper cause" to discharge the Captain under *either* agreement.

that Ritchie was the victim of disparate company discipline. He cited three prior MISSISSIPPI QUEEN mishaps—some involving substantial damage[5]—as to which the responsible pilots suffered no disciplinary action. The arbitrator felt it would be unfair, in light of Ritchie's forty years of untarnished maritime service, for the company to impose the draconian measure of termination. Accordingly, the arbitrator awarded Ritchie reinstatement as a Delta Queen pilot, restoration of lost seniority, and most of his back pay.[6]

Delta Queen appealed the arbitrator's decision to the district court pursuant to 29 U.S.C. § 185, challenging the contractual authority of the arbitrator to award reinstatement while, inconsistently, finding that Ritchie was grossly careless. The company asserts that the arbitrator, having found gross carelessness, is foreclosed from awarding a remedy at odds with the company-imposed discipline. To reinforce its position, Delta Queen points to article V(a) of the collective bargaining agreement, which states, "The right to discipline and discharge for proper cause are likewise the *sole responsibility of the Company*" (emphasis

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5. One of the prior incidents involved a collision between the MISSISSIPPI QUEEN and the CRIMSON GLORY on December 12, 1985, that resulted in over $1,000,000 in damage.

6. On August 4, 1988, the labor arbitrator sustained in principal part the union's grievance and found the following:

> I. Captain Philip Ritchie was guilty of 'gross carelessness' by his violation of the applicable Rules of the Road.
>
> II. Captain Philip Ritchie was the victim of disparate treatment which requires setting aside the discharge.
>
> III. Captain Philip Ritchie was not denied due process.
>
> The Company shall immediately reinstate Captain Philip Ritchie to full employment and restore all lost seniority [and most back pay].

added). The district court agreed with the company and granted summary judgment in its favor, vacating the arbitrator's decision to reinstate Ritchie. The union appeals, believing that the federal court erroneously interfered with the arbitral process.

II.

[1] Judicial review of arbitration awards is extremly limited. So long as the arbitrator's decision "draws its essence from the collective bargaining agreement" and the arbitrator is not fashioning "his own brand of industrial justice," the award cannot be set aside. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)). However, federal courts are free to secrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement. *Container Prods., Inc., v. United Steelworkers of Am.* 873 F.2d 818, 820 (5th Cir.1989). Where an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy. *Id; see also* 9 U.S.C. §10(d) (district court may vacate award where arbitrator exceeds his power).

[2,3] Thus, while an arbitrator's decision is accorded considerable judicial deference to the extent it touches the merits of the controversy, his jurisdiction nevertheless is shaped by the underlying collective bargaining agreement. *See Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. at 1361 (if arbitrator is unfaithful to collective bargaining agreement, award will not be enforced by courts). He may look beyond the written contract when interpreting a collective bargaining agreement if the instru-

ment is ambiguous or silent upon a precise question. *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union,* 831 F.2d 72, 75 (5th Cir.1987). However, where the arbitrator exceeds the express limitations of his contractual mandate judicial deference is at an end. Thus, since this jurisdictional challenge focuses upon whether the award is grounded in the bargaining agreement, we will review the district court's decision *de novo. Accord HMC Management Corp. v. Carpenters Dist. Council,* 750 F.2d 1302, 1304 (5th Cir.1985) (independent review of district court's ruling that award not grounded in bargaining agreement).

III.

A.

[4] Federal law encourages private resolution of labor disputes through arbitration. However, the company and union may limit the discretion of the arbitrator in the collective bargaining agreement. *Misco,* 484 U.S. at 37-38, 108 S.Ct. at 370-71. By so doing, it is possible to vest in the employer complete discretion over terminations which the arbitrator is not free to usurp. *See Bruno's, Inc. v. United Food & Commercial Workers Int'l Union,* 858 F.2d 1529 (11th Cir.1988) (vacating portion of arbitrator's decision that was within province of employer). In fact, in *Enterprise Wheel & Car Corp.,* the Court announced the following limit upon arbitral authority:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

363 U.S. at 597, 80 S.Ct. at 13.

We have interpreted Supreme Court jurisprudence as requiring vacation of arbitral decisions that reinstate discharged employees when such arbitral action is deemed to be an ultra vires act. In *Container Products*, the arbitrator reinstated a discharged employee to "promote good labor relations," although the collective bargaining agreement reserved disciplinary decisions for the company. As in the case before us, the arbitrator failed to make a specific finding of "just cause" for discipline although, inconsistently, he noted that the employee had no good reason to refuse to work. The court held that the arbitrator made an "implicit finding of just cause for dismissal," 873 F.2d at 820, and that consequently, the arbitrator had no jurisdiction under the collective bargaining agreement to assess an alternative remedy or impose an individually-tailored modification to the punishment.[7]

Several of our sister circuits similarly have declined to respect arbitral decisions that conflict with the underlying collective bargaining agreement. In *Bruno's* for example, the court focused upon an arbitrator's power to fashion a new disciplinary policy for an employer. There, an employee had been terminated for violating company procedure. The court vacated a portion of the arbitrator's decision that had established new operating procedures, because such rulemaking conflicted with his jurisdictional authority under the bargaining agreement, which vested the employer with unfettered discretion over its own rules and operating procedures. In vacating part of the

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7. *See also HMC Mgmt. Corp.* (arbitrator's decision to reinstate discharged employee remanded because, having found just cause, he exceeded his contractual authority by modifying discipline).

arbitrator's award., the court held that the arbitrator "may not create a new rule to replace one he strikes down as unreasonabale." 858 F.2d at 1532. Specifically, the employer reserved onto itself such authority, which barred the arbitrator from fashioning his own "improved" rules.[8]

B.

Delta Queen presents three arguments seeking vacation of the arbitrator's decision to reinstate Ritchie. First, the collective bargaining agreement in effect at the time Ritchie was fired limited the arbitrator's jurisdiction to the issue of whether "proper cause" existed for company discipline. Having found "gross carelessness," the arbitrator impliedly found proper cause as defined in the agreement and, accordingly, he was divested of further jurisdiction over the matter. Any subsequent disciplinary decision became the sole responsibility of Delta Queen.

Second, the company argues that the arbitrator gratuitously—and erroneously— found disparate treatment in company discipline over a period of time covered by materially different collective bargaining agreements, contracts which do not lend themselves to fair comparison. Specifically, any inconsistency in punishment is the result of differences between an expired, pro-union collective

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8. Similarly, the Sixth Circuit has been intolerant of ultra vires acts of labor arbitrators. *See, e.g., International Bhd. of Elec. Workers, Local 429 v. Toshiba Am. Inc.* 879 F.2d 208, 210-11 (6th Cir.1989) (arbitrator lacked authority under collective bargaining agreement to reinstate discharged employees who stipulated that they had violated agreement's no-strike clause); *Magnavox Co. v. International Union of Elecl, Radio & Mach. Workers,* 410 F.2d 388, 389 (6th Cir.1969) (arbitrator lacked authority to reinstate employee after finding that just cause existed for discharge and where sole responsibility for discipline rested with employer).

bargaining agreement and a later agreement that made employee discipline easier to effect.[9] Third, Delta Queen suggests that the reinstatement of Ritchie would violate important public policy interests, namely, ensuring that competent pilots having sound discretion are in charge of the lives of the passengers and crew on board its vessels.[10]

The union argues that the arbitrator, never having found "proper cause" expressly, did not exceed his "broad" jurisdictional powers when he reinstated Ritchie. More accurately, the arbitrator was free to inject disparate company treatment into the calculus of whether "proper cause" existed. According to the union, a finding of "gross carelessness" does not foreclose the inquiry or terminate the analysis. Since the arbitrator did not make the necessary finding of proper cause for discipline, reinstatement was appropriate under the collective bargaining

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9. Article VI of the collective bargaining agreement in effect between the company and the union at the time of the prior MISSISSIPPI QUEEN mishaps provided that a riverboat captain could be discharged for "*gross* or *repeated carelessness,* or willful disregard of the rules of the Company" (emphasis added). Delta Queen suggests that this version required a pattern of misconduct, as carelessness had to be repeated (unless "gross"). In contrast, the agreement in effect at the time of this mishap dropped the word "repeated," making discipline available based upon a single event.

10. Federal courts are not compelled to enforce arbitration awards that are contrary to well-defined public policy. *See Misco,* 484 U.S. at 42, 108 S.Ct. at 3; *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). The public policy exception, although narrow, has been used by this court previously to vacate an arbitrator's decision to reinstate a truck driver who drank while on duty. *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.,* 712 F.2d 122, 125 (5th Cir.1983). Because we conclude that this appeal turns upon the contractual authority of the labor arbitrator, we decline to address this public policy issue.

agreement, because the company never had the option to impose employee punishment.

C.

[5,6] We conclude that this court's recent pronouncement in *Container Products* controls the resolution of this case. We agree with the company that the rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected. That being so, we find that the collective bargaining agreement in effect between Delta Queen and the union proscribed the arbitrator from reinstating the discharged employee in this case.

We understand the plain language of article VI of the agreement to confer upon the arbitrator the authority to determine whether there is "proper cause" for discipline because of employee carelessness. If proper cause exists, article V shifts sole responsibility for disciplinary action to management. In this case, the arbitrator found "gross carelessness' without finding "proper cause" for discipline.[11] Contrary to what the union suggests, the lack of an express finding is immaterial here.

As this court concluded in *Container Products,* should the arbitrator "implicity find" that proper cause exixts, he need not recite the operative phrase "proper cause." 873 F.2d at 820 (agreement in that case used phrase "just cause"). The phrase carries no talismanic significance in labor jurisprudence. It is simply a term of art that defines the many unrelated, independent acts that

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11. Under the collective bargaining agreement, the arbitrator needed only to find "carelessness" and not "gross carelessness' for the company to impose employee discipline.

serve as grounds for employee discipline under the agreement. If a collective bargaining agreement defines "proper cause" to include a nonexhaustive list of offenses, an arbitrator cannot ignore the natural consequence of his finding that a listed offense was committed. To hold otherwise would allow arbitrators to shape employee discipline, in agreements where discipline is reserved to management, because an arbitrator declines to chant certain operative words. We have not previously injected such formulation into labor arbitration, and we decline to do so here. Thus, where an arbitrator fails to make an express finding of proper cause, he nevertheless will be so bound if he finds that the employee committed certain underlying acts that constitute proper cause under the collective bargaining agreement.

D.

In summary, we conclude that the arbitrator, having found Ritchie grossly careless, impliedly found proper cause for discipline. That being so, the arbitrator was without authority, under the bargaining agreement, to reinstate Ritchie. The district court properly vacated that portion of the arbitral award requiring reinstatement and, accordingly, we AFFIRM.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-872

District 2 Marine Engineers Beneficial Association, et al.

v.

Delta Queen Steamboat Comapny

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 17, 1990.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 6th
day of June, 1990.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE DELTA QUEEN STEAMBOAT COMPANY	*	CIVIL ACTION
VERSUS	*	NO. 88-3707
DISTRICT 2 MARINE ENGINERS BENEFICIAL ASSOCIATION - ASSOCIATED MARITIME OFFICERS, AFL-CIO	*	SECTION "H"

****

FILED JAN 2, 1989

Reasons for Judgment given in the above captioned matter on Wednesday, January 4, 1989, the Honorable Adrian G. Duplantier, District Judge, presiding.

APPEARANCES:

FOR THE PLAINTIFFS:

MONTGOMERY, BARNETT, BROWN, READ, HAMMOND & MINTZ
BY: Daniel Lund, Esquire
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FOR THE DEFENDANTS:

O'DONNELL & SCHWARTZ
BY: Joel C. Glanstein, Esquire
60 East 42nd Street
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AND

GARDNER, ROBEIN AND HEALEY
BY: William Lurye, Esquire
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REPORTED BY: O. J. ROBERT, JR., CSR
OFFICIAL COURT REPORTER

THE COURT: I'm not going to know anymore than what I know now. I know where this is heading, so, we might as well send it there with expedition.

I will focus on the last discussion we have had, and on the language in *Misco* as well. I note that at Page 372 in *Misco*, 108 Supreme Court Reporter, Justice White points out that the issue before that arbitrator was whether there was just cause, and apparently that arbitrator decided that there was not just cause in that case. That's all I can conclude from the opinion.

In this case, the arbitrator frames the issue whether the company had proper cause to discharge Captain Ritchie and immediately thereafter — well, let me change that. Let me see his own language. This is the company argument that I am citing. Let me get to his findings. His findings under Roman Numeral I on Page 24, while he never apparently uses the words "Proper Cause" again, can be read

in no other fashion but to state that he finds that Ritchie's activities, having constituted gross negligence, were a proper cause for discharge.

He then, despite the fact that the "issue" states that he reaches proper remedy only if he finds no proper cause for discharge, he then goes on to state simply that it is unfair and unjust to impose the penalties upon him, and proceeds to deal with his own decision as to what is the proper penalty for gross recklessness, though the contract says a proper penalty is discharge.

So, I hold that the difference here between this case and *Misco* is that the contract, in about as plain language as I can write, though in hindsight I can write it plainer, I suppose, the contract in this case gives the employer the right to discharge in the event of carelessness.

And I hold that to apply the disparate treatment situation the way we apply it here would mean that the company could never dig itself out of a situation where it has to continue to employ people who are grossly careless, because if you didn't discharge the one, if you didn't discharge the next one, if you don't discharge Captain Ritchie, you can't discharge the next one, you can never discharge anybody for gross carelessness.

Some day somebody is going to sink the Mississippi Queen and the Delta Queen when they collide in the river.

All right, I'll vacate the award and package this up for the Court of Appeal for those reasons.

MR. LUND: Your Honor, we submitted a proposed judgment to you. Would Your Honor take that under consideration, or —

THE COURT: Well, let's see. Why don't I get Counsel here to look at that. I'm not suggesting that you agree to anything, obviously. It is before you now; let's do that now. I see it. I have it before me. Let's talk about what the judgment should say.

Let me hasten to say, I do not criticize the Union for not submitting a judgment. the Union is correct that our rules do not provide for submission of a judgment.

I might change some of the language about "Good" and "Not Good, " but look at the substance of it, Counsel for the Union.

Well, I can tell you now that I'm not going to sign it in that fashion. I'm not much on dictum in reasons, and particularly not in judgments.

MR. GLANSTEIN: I don't believe, Your Honor, we should have costs assessed against us.

THE COURT: Excuse me?

MR. GLANSTEIN: I don't believe we should have costs assessed against us.

THE COURT: Tell me why.

MR. GLANSTEIN: I don't have the rules in front of me, but I don't believe that where each side believes that an arbitration award supports their position, or doesn't support their position that the —

THE COURT: All we're talking about here are Court costs.

MR. GLANSTEIN: Oh.

THE COURT: These are costs assessable under our local rules by the Clerk. It is going to be $100. We're not talking about incidental costs. I don't want to fuss at New York, but you folks, as to Rule 11, are goosey. We don't do those things around here as heavy handed as is done somewhere else. We're in the South.

MR. GLANSTEIN: Your Honor, I am also a little mystified about your decision in view of the —

THE COURT: Excuse me?

MR. GLANSTEIN: I'm a little mystified about your decision in view of the extensive —

THE COURT: Well, you may be mystified, but —

MR. GLANSTEIN: — remand —

THE COURT: — but I'm not asking you to tell me whether you're mystified. I have limited powers of destroying mystery, but any way, the costs are assessed against the losing party routinely. Anyway, if you don't want to respond whether the judgement is right but only want to tell me that you're mystified, I will so note.

I have a New Year's resolution to be patient.

MR. GLANSTEIN: Thank you.

THE COURT: So, I'm mystified by your mystification.

MR. GLANSTEIN: Your Honor, I don't believe it's

necessary to go in the judgment in all of those details. Simply grant the motion —

THE COURT: I agree with you.

MR. GLANSTEIN: — grant the motion —

THE COURT: And vacate the award, that's really all that's necessary. I think Counsel for management would agree with that.

MR. LUND: Yes, sir.

THE COURT: But, let's see what would do that. Do we agree that the only thing that is essential to it is to vacate the award of the arbitrator?

MR. GLANSTEIN: I think that will be —

THE COURT: August 14th, and that date is correct?

MR. LUND: Of course, a portion of the award denies the grievance. It is the portion of the award which requires —

THE COURT: Denies the grievance?

MR. LUND: Well, denies the Unions grievance. It is the portion of the award which sets aside the discharge.

THE COURT: All right, suppose we say "That portion of the award, et cetera, et cetera, the arbitrator which —"

MR. LUND: Which sets aside the discharge.

THE COURT: "— which requires the setting aside of the discharge of Captain Philip Ritchie."

MR. LUND: And orders his reinstatement.

THE COURT: Which orders his immediate reinstatement to full employment."

I don't need all of that.

MR. LUND: I think that language —

THE COURT: If you just say "Setting aside of the discharge is vacated," the rest of it follows, wouldn't it?

MR. LUND: I think so.

THE COURT: If I vacate that portion of the award which sets aside his discharge, the rest of it follows.

MR. LUND: Okay.

THE COURT: All right, I will do the judgment in the form that we ordinarily would do a judgment, and suffice it to say, for the oral reasons I just dictated, I grant the motion of Delta Queen Steamboat Company for summary judgment and deny District 2's cross motion.

REPORTER'S CERTIFICATE

I, O.J. Robert, Jr., Official Court Reporter, for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within entitled and numbered cause on the date hereinbefore set forth and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ O.J. Robert Jr.

O.J. ROBERT, JR.
Official Court Reporter
United States District Court
Eastern District of Louisiana

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
JAN 4 1989

THE DELTA QUEEN STEAMBOAT COMPANY — CIVIL ACTIION

VERSUS — NO. 88-3707

DISTRICT 2 MARINE ENGINEERS AND BENEFICIAL ASSOCIATION, ASSOCIATED MARITIME OFFICERS AFL-CIO — SECTION "H"

JUDGMENT

The court having, on January 4, 1989, granted the motion of plaintiff for summary judgment, and for the oral reasons of the court dictated into the record;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, The Delta Queen Steamboat Company, and against defendant, District 2 Marine Engineers and Beneficial Association, Associated Maritime Officers AFL-CIO, vacating that portion of the August 4, 1988 award of the arbitrator which requires the setting aside of the discharge of Captain Philip Ritchie, and for costs.

New Orleans, Louisiana, this 4th day of January, 1989.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY — Jan 5 1989

APPENDIX F

DELTA QUEEN STEAMBOAT COMPANY

AND

DISTRICT 2 MARINE ENGINEERS

AND

OFFICIAL ASSOCIATION - ASSOCIATED MARITIME OFFICERS, AFL-CIO

RE: Termination of Captain Philip Ritchie

APPEARANCES

FOR THE COMPANY	Montgomery, Barnett, Brown, Read, Hammond and Mintz By: A. Gordon Grant, Jr. Attorneys
FOR THE UNION	O'Donnell and Schwartz By: Joel C. Glanstein Attorneys
ARBITRATOR	John F. Caraway, selected by mutual agreement of the parties.

This proceeding involves the discharge of Captain Philip Ritchie on May 29, 1987 for an incident which occurred on May 21, 1987 while he was serving as Pilot on the passenger vessel MISSISSIPPI QUEEN. The MISSISSIPPI QUEEN is operated by the Delta Queen

Steamboat Company [hereinafter referred to as "Company"].

Hearings were held on October 15 and 16, 1987, January 7 and 8, 1988 and March 28, 1988. A transcript was prepared. The October hearings will be noted in this decision as TR I, the January hearings as TR II, and the March 28 hearing as TR III. The testimony of witnesses was presented. Voluminious exhibits were filed into the record. Both parties filed post-hearing briefs.

The MISSISSIPPI QUEEN is approximately 385 feet long, 69 feet wide, 2,000 horsepower with a crew of 150. It can accommodate up to 500 passengers. The propulsion is steam to paddle wheel with a bow thruster and rudders controlled by an electric hydraulic system from the pilothouse with steering levers. [TR 1 - 150].

The Master is in complete charge of the navigation and operation of the vessel. There is a Pilot aboard who has the responsibility of navigating the vessel in a safe and prudent manner subject to applicable laws and regulations and specifically the Rules of the Road. When the vessel is released to him from the Master, the Pilot is in charge of the navigation of the vessel. Under the Master in the chain of command is the First and Second Mate whose duty it is to assist the Pilot in navigating the vessel, supervise the crew, and take care of the day to day operation of the vessel.

Captain Philip Ritchie was hired by the Company on a permanent basis as a Pilot. He has been a United States Coast Guard Licensed Master and Pilot for approximately forty (40) years. He had been employed by the Company in 1970 and in 1974. [TR II - 8 and 9].

On April 24, 1987, Captain Philip Ritchie joined the MISSISSIPPI QUEEN as Pilot. He alternated watches with Captain Davitt who had worked permanently for the Company for about three (3) years. [TR I -148].

Captain Davitt testified that on May 21, 1987 when he relieved Captain Philip Ritchie at about 6:00 AM the vessel was proceeding at 14 rpms. He had received and related to Captain Philip Ritchie that other boats in the area had stated that Mason's Landing was hot-swift. [TR I -165]. After being relieved by Captain Philip Ritchie, Captain Davitt returned to the pilothouse to observe the operation of passing through Mason's Landing. During this time Captain Philip Ritchie passed other boats on arrangements. These arrangements to pass were made by radio or whistle signal under the Rules of the Road. This was done as the MISSISSIPPI QUEEN was proceeding from Mile 610 to the area of Mason's Landing at Mile 612.5.

Captain Davitt testified that he was aware that a large towboat, the Harry Mack, was stalled at Mason's Landing. The Harry Mack was pushing 34 barges, the tow being 1,400 feet long and 210 feet wide. The head of the tow was six (6) barges wide and the after was five (5) barges wide. [TR I -43].

When the MISSISSIPPI QUEEN was about one-half mile astern of the Harry Mack, according to Captain Davitt, Captain Philip Ritchie called the Harry Mack for permission to pass on two (2) whistles to port. [TR I -168]. The Captain of the Harry Mack, who was Captain Clark, replied that he was stalled and that he would prefer that the MISSISSIPPI QUEEN not pass. [TR I -171]. Captain Philip Ritchie then said that he was committed to pass. Captain Clark said he was not sure he could hold her in the

current. [TR I -203]. At no time did Captain Clark tell the MISSISSIPPI QUEEN that she could pass. [TR I -204].

The MISSISSIPPI QUEEN kept in a passing operation and began to lose headway. Captain Philip Ritchie asked Captain Davitt to call the engine room to get more RPMs. Captain Davitt did that with the Engineer saying that she was opened all the way. [TR I -176]. Captain Davitt at this point, was on the starboard bridge giving Captain Philip Ritchie distances to the Harry Mack. His first report was that 60 feet separated the two (2) vessels. [TR I - 176]. The headway on the MISSISSIPPI QUEEN keep decreasing. Captain Philip Ritchie told Captain Davitt to call the Master who was Captain Charlie Ritchie, a cousin of the grievant, and tell him that they needed more RPMs to get through the channel. [TR I - 180].

Shortly thereafter the MISSISSIPPI QUEEN heeled to starboard. the vessel, at this point, was headed toward the Harry Mack. [TR I - 182]. The stern of the MISSISSIPPI QUEEN had not passed the head of the tow, according to Captain Davitt. Captain Davitt and the First Mate went to the bow to swing the stage clear of the Harry Mack's tow. The general alarm and danger signal was sounded by Captain Philip Ritchie. [TR I - 184]. Captain Davitt stated that the stage of the MISSISSIPPI QUEEN which is a gang plank extending off from the bow of the vessel, passed about fifteen (15) feet from the Harry Mack. [TR I - 186]. Captain Davitt stated that he saw the Harry Mack backing down river. The MISSISSIPPI QUEEN then made a full 360^{o} turn and proceeded in its original direction of northbound on the Mississippi River. To get through the channel at Mason's Landing the MISSISSIPPI QUEEN was assisted by the Miss Shirley. [TR I - 188].

On cross-examination, Captain Davitt stated that he did not feel the MISSISSIPPI QUEEN strike anything. He assumed she may have run up on something. [TR I - 223]. Captain Philip Ritchie completed the watch on May 21 and continued his regular watches for the next seven (7) to eight (8) days until the MISSISSIPPI QUEEN returned to its home port at New Orleans. [TR I - 234].

Captain Davitt stated that he was of the opinion that MISSISSIPPI QUEEN had violated the Rule of the Road pertaining to overtaking. It is a violation of that rule for the overtaking vessel to pass the overtaken vessel without permission. The burden vessel which was the MISSISSIPPI QUEEN is obligated to stay clear of the privileged vessel which was the Harry Mack. [TR I - 194].

Captain Clark testified that he was the Captain of the M/V Harry Mack, owned by American Commercial Barge Lines. [TR I - 142]. He has been a licensed Captain on the Mississippi River since 1969. He has served as Captain of the Harry Mack. The Harry Mack is a large river towboat. She is 180 feet long and 54 feet wide. Captain Clark stated that he was northbound and had reached Mason's Landing when he incurred a strong current. He could not push through the channel at Mason's Landing and was holding waiting for help. He had a tugboat, the Miss Shirley, helping push him, but it was insufficient. [TR I - 48]. Captain Clark stated that he observed other vessels holding downstream from him. They were unable to proceed as the Harry Mack was blocking the channel.

Captain Clark stated that he received a radio signal from the Pilot of the MISSISSIPPI QUEEN desiring that the vessel go by the Harry Mack. Captain Clark told Captain Philip Ritchie that he would rather that he did not pass as it was unsafe. Captain Clark said he was not sure

that he could hold what he had. Captain Philip Ritchie then said, "I don't believe I can hold her in these rough waters, I have no choice but to go". Captain Clark then told Captain Philip Ritchie "If you do, you're doing it on your own and I do not agree to it." [TR I - 71].

The MISSISSIPPI QUEEN said she was coming by on two (2) whistles meaning that she was going to pass the Harry Mack to the port side. [TR I - 81]. Captain Clark then observed the MISSISSIPPI QUEEN stalled out and making no headway. She had just about passed the head of his tow. [TR I - 81]. At this point the MISSISSIPPI QUEEN began topping which is to say turning around toward the starboard on the head of the Harry Mack tow. [TR I - 86]. As the MISSISSIPPI QUEEN topped, Captain Philip Ritchie told Captain Clark to "Back her out. She is topping. I can't hold her." [TR I - 88]. With that Captain Clark put his boat full astern and commenced backing out. As he did so the staging plank of the MISSISSIPPI QUEEN swung over the head of his tow. The Harry Mack was able to successfully back off.

Captain Clark said he never gave permission to the MISSISSIPPI QUEEN to overtake him as required by the Rule of the Road. In his opinion, the MISSISSIPPI QUEEN violated the Rules of the Road by its action. [TR I - 97].

Captain Charlie Richie, Master of the MISSISSIPPI QUEEN, stated that he first realized that a problem existed when he was called by Captain Davitt to get the engine room to give them more RPMs to get through Mason's Landing. He dressed and came up on the bridge. The MISSISSIPPI QUEEN at that time was topping and was on a collision course with the Harry Mack. The Harry Mack then commenced backing down river. The bow of the

MISSISSIPPI QUEEN cleared the bow of the tow. [TR I - 273]. In Captain Charlie Richie's opinion the closest point between the two (2) vessel was fifteen (15) to twenty-five (25) feet.

Captain Charlie Ritchie stated that he discussed the incident with Captain Philip Ritchie, Captain Davitt and Mate Weber. He concluded that Captain Philip Ritchie should never have tried to pass the Harry Mack. His effort to save some four (4) to six (6) hours was not a decision Captain Philip Ritchie should have made. It was the Master's decision. [TR I - 290 - 291]. He told Captain Philip Ritchie this.

Captain Philip Ritchie told him that the Harry Mack was plugging the hole; that he wanted someone to push him through. It was necessary to force the Harry Mack to back out to wait for his tug to assist rather than waiting in the bottleneck. [TR I - 311].

Captain Charlie Ritchie stated that he did not fire Captain Philip Ritchie on the spot as there was no collision. Further, they were first cousins. In addition, Captain Philip Ritchie was a competent Pilot. He reported the incident to Mr. Fahey Executive Vice President, for him to take what action he deemed necessary.

Captain Charlie Ritchie stated that the prudent thing for Captain Philip Ritchie to do was to have stopped the MISSISSIPPI QUEEN some seven to seven hundred fifty feet from the stern of the Harry Mack until the Harry Mack was able to push through the channel. [TR I - 435].

Captain Charlie Ritchie related an incident involving the MISSISSIPPI QUEEN and the Crimson Glory. Captain Ruben Williams was the Pilot and Captain Charlie

Ritchie was the Master. The MISSISSIPPI QUEEN was overtaking the Crimson Glory when a collision occurred. Neither Captain Williams nor himself received any discipline. [TR 1 - 352]. The incident occurred on December 12, 1985. Captain Williams died on April 10, 1986. In a preliminary report the Coast Guard had recommended the suspension and revocation of the license of Captain Ruben Williams as well as Captain Charlie Ritchie. [Union Exhibit No. 1 and 2].

Captain Charlie Ritchie also related an incident which occurred on September 29, 1986 when the MISSISSIPPI QUEEN ran under the bridge at St. Louis on flood stage. Captain Philip Ritchie may have told him to wait for better visability. Captain Charlie Ritchie decided to go ahead to avoid the flood state of the river in order to get under the bridge. [TR I - 393].

Captain Charlie Ritchie stated that the fact the Harry Mack did not expressly refuse to permit the MISSISSIPPI QUEEN to overtake nor sound a danger signal did not give permission for the MISSISSIPPI QUEEN to overtake because there was not a positive agreement to overtake reached. [TR 1 - 450].

Mr. Fahey, Executive Vice President and Chief Executive Officer of the Company, testified that he learned of the Harry Mack incident through talking to the Hotel Manager of the vessel. He then talked to Captain Charlie Ritchie and told him that he wanted full details on the incident when the MISSISSIPPI QUEEN returned to New Orleans. [TR I - 456]. Upon hearing from Captain Charlie Ritchie and consulting with his attorneys, Mr. Fahey concluded that Captain Philip Ritchie was guilty of poor judgment and the required action was to terminate him. [TR I - 465]. He considered that Captain Philip Ritchie was at

fault for attempting to overtake the Harry Mack on that stretch of the river which was exceedingly strong without any real necessity to do so. It was extreme poor judgment to jeopardize the lives of some 500 crew members and passengers by his actions. It was clear to Mr. Fahey that Captain Philip Ritchie did not have consent to overtake the Harry Mack. By doing so without consent he placed the vessel and its crew and passengers in jeopardy.

Mr. Fahey stated that he was aware of the forty years that Captain Philip Ritchie has been a Pilot with a good record. He was accident free. This record was overweighed by the threat to the members of the crew and passengers by the poor judgment exercised by Captain Philip Ritchie on May 21, 1987. [TR I - 505].

Mr. Fahey commented on the difference between the Crimson Glory incident and that of the Harry Mack. With the Crimson Glory the MISSISSIPPI QUEEN had permission to overtake. While it is true that the MISSISSIPPI QUEEN suffered some one million dollars worth in damages, there was no apparent violation of the Rules of the Road. [TR 1 - 41]. The fault in that incident was navigational maneurving. The Company has never accepted the conclusions of the Coast Guard or the National Transportation Board in that incident.

First Mate Richard Weber testified to the radio conversation he heard between Captain Philip Ritchie and the Captain of the Harry Mack. He heard the Captain of the Harry Mack state that it was not a good idea to overtake. He was having trouble holding his tow in position and that his tow may top around. [TR 11 - 495]. Captain Philip Ritchie replied that he was already committed. Mr. Weber then heard the Harry Mack say that he did not desire the

MISSISSIPPI QUEEN to pass. When the MISSISSIPPI QUEEN's engine room door was about even with the head of the tow of the Harry Mack, the MISSISSIPPI QUEEN began began to stall out. She was about 50 feet off the tow of the Harry Mack. [TR II - 513-514].

Captain Philip Ritchie testified that he had navigated tows in the area of Mile 610 - 612.5 approximately 400 times during his career. Of this, ten to fifteen times was as Pilot on a passenger boat. The current on the river, at this point, was 2-½ to 3 miles per hour while the MISSISSIPPI QUEEN was proceeding at a speed of 5-½ miles over the water. [TR II - 80]. Captain Philip Ritchie testified that he had taken over the helm at 0600 AM. As he approached Dennis Landing he had passed eight tows before he reached the Harry Mack. [TR II - 76]. These vessels were passed by radio telephone agreement or by a passing signal on the whistle.

Captain Philip Ritchie stated that he approached the Harry Mack on his starboard side. As he crossed his wheel wash, he blew him two whistles for a passing to port. [TR II - 87]. By radio the Captain of the Harry Mack asked the MISSISSIPPI QUEEN "What do you intend to do?". Captain Philip Ritchie replied that he wanted to come by on a two whistle side. The Harry Mack replied, "I would rather you wouldn't." [TR II - 88]. Captain Philip Ritchie said, "Captain, I don't believe I can hold her in the turbulence of your wheel wash back here." The Captain of the Harry Mack then said, "Well, you do what you want to do, but I'd rather you wouldn't." [TR II - 89]

Captain Philip Ritchie stated that he took that as an agreement or permission for him to pass the Harry Mack. He then blew him a passing signal of two whistles. At this time he was about 100 feet off the tow. [TR II - 91].

Captain Philip Ritchie sent First Mate, Captain Weber to the starboard bridge to give him distances between the two vessels. He then called for extra RPMS to build up momentum to get through the swiftest part of Mason's Landing. When his speed did not build up sufficiently, the Captain asked Captain Davitt who was on the bridge to contact the Master to see if he could get the Chief Engineer to get more RPMs.

At about this time, Captain Philip Ritchie received a signal from Captain Weber that the MISSISSIPPI QUEEN had cleared the head of the Harry Mack tow. [TR II - 102]. At this point, the bow of the MISSISSIPPI QUEEN rared up in the air. She commenced topping to starboard. The MISSISSIPPI QUEEN commenced backing down to avoid the tow. The Harry Mack also backed down and they had a "close call". [TR II - 105].

Captain Philip Ritchie explained that when the MISSISSIPPI QUEEN began to top he called the Harry Mack and asked him to back out. He also sounded the general alarm and blew the danger signal. He instructed Captain Weber to go to the bow to swing the stage. [TR II - 107]. At about that time Captain Charlie Ritchie arrived on the bridge and took the con.

Captain Charlie Ritchie then gave maneuvering orders so that the bow of the MISSISSIPPI QUEEN came around to upriver and she proceeded on that course. Captain Philip Ritchie thereafter resumed piloting the vessel. [TR II - 109].

The vessel had returned to New Orleans and on May 29, 1987 Mr. Fahey came aboard the MISSISSIPPI QUEEN and advised Captain Philip Ritchie that he was being dismissed as Pilot for the incident of Mile 612 on

May 21. [TR II - 146].

By letter dated June 1, 1987 [Joint Exhibit No. 2] Captain Philip Ritchie was discharged. The discharge letter read as follows:

> "Enroute to Memphis on May 21, 1987 at about 7:00 AM you *overtook and passed* a towboat in a hazardous stretch of the river. In doing so, you violated the applicable Rules of the Road. This act put the Mississippi Queen in danger. It compromised the safety of her passengers and crew. This is the cause of your termination."

Captain Philip Ritchie then filed a grievance protesting the discharge under date of June 2, 1987. [Joint Exhibit No. 3].

CONTRACT PROVISIONS INVOLVED

"A. *Contract Provisions*

1. Article VI/DISCHARGE OF OFFICERS

> "No officer shall be discharged except for proper cause such as, but not limited to, inefficiency, insubordination, gross or repeated carelessness, or willful disregard of the rules of the Company. Any officer discharged by the Company shall be notified in writing. Such written notice shall be given to the officer at least (sic) seventy-two (72) hours after he/she has been disciplined and a copy of the notification shall be sent to the Association simultaneously via certified mail".

2. Article X - Manning Scale, Section 1:
"The Manning scale for the current two vessels covered by the Agreement shall be as follows:

MISSISSIPPI QUEEN

ONE MASTER
TWO TRIP PILOTS
ONE FIRST MATE
ONE SECOND MATE

DELTA QUEEN

ONE MASTER
TWO TRIP PILOTS
ONE FIRST MATE
ONE SECOND MATE

This scale only applies when the vessels are operating."

3. Article XIII/GRIEVANCE AND ARBITRATION PROCEDURE

Section 1, Step III -

The parties agree that John F. Caraway is hereby appointed Arbitrator hereunder. Mr. Caraway shall decide all grievances, disputes, disagreements or controversies arising between the Union and the Company relating to or involving the interpretation, construction, application or performance of any of the terms or conditions of this Agreement which arise on or after July 1, 1986.

The Arbitrator shall, consistent with fairness and due determination of the matter submitted to him, render his/her decision within seven (7) days after submission of the controversy to him/her. All expenses of arbitration, including the fee of the Arbitrator, shall be paid by the party against whom the Arbitrator rules.

The Arbitrator shall have only jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement. The Arbitrator shall not have the jurisdiction or the authority to add or alter in any way the provisions of this Contract or change the wages, time off, working rules or any other conditions of employment established hereunder.
Section 3 - Any grievance relating to a discharge shall be expedited and the matter shall be arbitrable within five (5) working days from the date of the receipt of the notification of discharge."

ISSUE

Did the Company have proper cause to discharge Captain Philip Ritchie on May 29, 1987? If not, what is the proper remedy?

COMPANY ARGUMENT

The Company maintains that it had proper cause to discharge Captain Philip Ritchie because his actions placed the lives of over 500 people in dire jeopardy. The evidence adduced at the arbitration hearing proved the recklessness of Captain Philip Ritchie. His claim that he had reached an overtaking agreement with the Harry Mack is contrary to the evidence.

Captain Clark of the Harry Mack told Captain Ritchie that it was unsafe and he could not hold the position of his tow. He stated he did not agree to an overtaking agreement with the MISSISSIPPI QUEEN. Captain Davitt was unequivocal in stating that the Pilot of the Harry Mack did not consent to the overtaking agreement proposed by Captain Philip Ritchie. From hearing the conversation, Captain Davitt could not see how anyone could conclude that there was an overtaking agreement made. Captain Weber, likewise, corroborated the testimony of the other two (2) witnesses that no agreement to overtake was reached.

For an overtaking agreement to be reached under Rule 34 of the Inland Rules of the Road, there must be a proposal and an agreement before the vessel initiates and makes the overtaking maneuver. This was absolutely lacking in the case with Captain Philip Ritchie. The consent was not specifically given. The MISSISSIPPI QUEEN was legally obligated to stop until the proposed overtaking arrangement was assented to. Captain Philip Ritchie was in clear violation of Rule 34 by persisting in his overtaking maneuver.

Captain Philip Ritchie's major mistakes were failing to perceive that it was unsafe to attempt to overtake the tow of the Harry Mack as it was stalled below Mason's Landing and failing to recognize the hazards of the situation. Captain Philip Ritchie violated Rule 9 by attempting to overtake the tow of the Harry Mack in a narrow channel.

The Company contends that on the morning of May 21, 1987, Captain Philip Ritchie flagrantly violated Rules 9, 13, and 34 of the Inland Rules of the Road. His actions were irresponsible and indicative of poor judgment and recklessness He has persisted in denying any responsibility

for a near disaster.

The Company has been greatly upset by the fact that Captain Philip Ritchie has never admitted any responsibility for what occurred on May 21, 1987. He does not concede that he made a mistake in attempting to overtake the Harry Mack in the first place. He further denies any rule violation by continuing his overtaking maneuver despite the fact that he had no consent from the Harry Mack.

To bolster its position the Union offered the testimony of Captain Powell, a fellow Pilot. Captain Powell stated that he concluded that Captain Philip Ritchie did not violate any Rules of the Road, put the MISSISSIPPI QUEEN in any danger and do anything other than demonstrate normal judgment of the average Pilot. Captain Powell stated that an overtaking agreement was not necessary because the Harry Mack was not "underway". But for him to make this statement requires ignoring Rule 3 (h) of the Inland Rules which defines the term "underway" to mean "a vessel that is not at anchor, or made fast to the shore, or aground". The Harry Mack, at the time had its engines running full ahead and was merely holding awaiting the arrival of another vessel to assist her to push through the channel.

The Company points to the incredulous statement of Captain Philip Ritchie that if the same situation were presented to him he would navigate the MISSISSIPPI QUEEN in the very same manner that he did on the day of the incident because he did nothing wrong.

In the light of the facts of this case, the Company had no choice but to terminate Captain Philip Ritchie. The Company cannot operate a passenger vessel with a Pilot who performs in such a reckless manner. The Company was

legally and morally obligated to discharge Captain Philip Ritchie.

UNION ARGUMENT

The Union maintains that the Company did not have proper cause to discharge Captain Philip Ritchie under Article VI of the Agreement. The Union cited a number of criteria which constituted the test of whether proper cause existed. The employee was not forewarned that he could be discharged. Nor was the Company's position reasonable. Further, the Delta Queen did not conduct a meaningful investigation. It relied primarily upon the statement to Mr. Fahey by Captain Charlie Ritchie. No discussion was ever had with the grievant. It was clearly a one management decision. Captain Philip Ritchie was given no opportunity to refute or attempt to refute the conclusion by Mr. Fahey that he had exercised poor judgment in piloting the MISSISSIPPI QUEEN on May 21, 1987.

The Union maintains that there was not substantial evidence to support the discharge. Captain Philip Ritchie, the Union's expert Captain Robert Powell and Captain Charlie Ritchie all testified that given the ambiguous reply to the overtaking request received from Captain Clark of the Harry Mack, Captain Philip Ritchie properly used his judgment to overtake the vessel.

The so called corroborating witnesses, the Company relies upon are not impressive. Captain Charlie Ritchie had not observed the incident first-hand. First Mate Weber had no Pilot's license for Mile 612.5 nor a valid radar endorsement. Further, he was offered a Steersman's job five (5) weeks after the grievant was fired. He gave inaccurate estimates of the distances between the shoreline and the sandbar as well as the angular relationship of the

MISSISSIPPI QUEEN and the Harry Mack tow when the MISSISSIPPI QUEEN was topping.

Captain Davitt likewise was an unreliable witness. He came to the bridge in order to observe Captain Philip Ritchie's maneuvering through Mason's Landing. After the topping incident Captain Davitt exchanged watches with Captain Philip Ritchie so that he would have more daylight watches to familiarize himself with the river.

The testimony of Captain Clark that Captain Philip Ritchie had violated the Rules of the Road was contradictory in that there was a Coast Guard cutter in the area, yet he made no report to that Coast Guard vessel of this alleged act of negligence on the part of Captain Philip Ritchie.

Insofar as the criteria of applicataion of the Company rules, orders and penalties in a fair and even handed manner, this did not exist in the instant case. The Union cites the major collision of the MISSISSIPPI QUEEN with the M/V Crimson Glory on December 12, 1985 where the Commandant of the Coast Guard found negligence and fault on the part of the Pilot of the MISSISSIPPI QUEEN. The National Transportation Safety Board concurred in that finding. The damage to the MISSISSIPPI QUEEN was in excess of $1,000,000.00. Despite all of this, the Company took no action against either Captain Ruben Williams, the Pilot at the time, or Captain Charles Ritchie, the Master.

Another instance of disparate treatment was the occurrence in the mid-1980s when Pilot Palmor navigated the Delta Queen at Lock 24, Clarksville, Missouri passing through a lock with a wide open dam and flood conditions. He lost control of the vessel, had no Captain or Mate assisting him and went broadside against the dam causing

damage to the Delta Queen. No discipline was imposed on the Pilot or Master.

Another incident occurred when the Pilot grounded the Delta Queen on August 14, 1986. No disciplinary action was taken eventhough the vessel was holed and the Pilot involved was censured by the Coast Guard.

The Union cites a number of incidents where the Company knowingly used unlicensed Pilots over certain stretches of the Tennessee River when that Pilot did not have the proper pilotage license. A Captain Carr was used as a Pilot on the Mississippi above Jefferson Barracks bridge when his Pilot license extended only to the bridge.

Captain Philip Ritchie's record must be contrasted. He had worked for the Company for two (2) years completely free of discipline. He had never been disciplined for navigational judgments in his forty (40) year career in the Merchant Marine. All of the witnesses who testified at the arbitration hearing stated that the grievant was a competent or highly competent Pilot, with the exception of the incident of May 21, 1987.

The Company charges Captain Philip Ritchie with violating the Rules of the Road in the May 21, 1987 incident. This was cited in the written Notice of Discharge of June 2, 1977. While the letter was signed by Mr. Kish, Vice President and proper counsel for the Company, it was Mr. Fahey who did the investigation of the incident for the Company. Mr. Fahey concluded, after his investigation, that Captain Philip Ritchie should be discharged because of his exercise of "poor judgment" instead of " reckless disregard" for the Rules of the Road. Prior to receipt of this written notice, Captain Philip Ritchie had never been advised by any Company official or even Captain Charlie

Ritchie that he had violated any Rules of the Road. But it was apparent that the Company relied upon Captain Charlie Ritchie's statements in this regard. Further, the Company did not cite any specific rule that Captain Philip Ritchie violated. Thus, there is no basis for concluding that the discharge was based upon violation of Rules of the Road. It was for executing "poor judgment" as stated by Mr. Fahay. But the Union maintains that the evidence shows that the grievant exercised sound and good judgment when he made the decision which he did on May 21.

The Company contends that Captain Clark did not consent to the MISSISSIPPI QUEEN'S overtaing the tow. The incident was caused by the grievant's overtaking the Harry Mack without an agreement. This was in clear violation of Rule 13. In making this charge, the Company ignores the words of Captain Clark which were "You do what you want, but I'd rather you didn't". [TR 1-1129]. The Union maintains that this constituted an agreement by Captain Clark that the Mississippi QUEEN could pass. Even if no such agreemment was made, the Harry Mack was stalled out against the left descending bank of the Mississippi River and was not "underway." Under these circumstances there is no requirement that a consent be obtained.

The Union cites the testimony of Captain Powell, an expert Pilot. He stated that Captain Philip Ritchie did not violate any Rules of the Road and performed the normal judgments of the average Pilots. Captain Powell cited a statutory provision which proves that a boat which is holding is not "underway". This dispenses with the need to secure an overtaking agreement.

Captain Powell then analyzed each of the rules in terms of the facts presented in the incident and stated why

there was no rule violation.

Captain Philip Ritchie testified as to how he complied with the Rules of the Road. Further, he attributed the incident to a missing aid to navigation in the vicinity of a submerged bluff or sand reef. When the MISSISSIPPI QUEEN struck this bluff or sand reef, this striking caused the topping to starboard.

The Union further argues that by permitting Captain Philip Ritchie to perform his duties as Pilot from May 21 to May 29, 1987 despite the alleged "poor judgment" and the violation of the Rules of the Road, the Company condoned the grievant's actions or waived objection thereto. Captain Charlie Ritchie had no explanation as to why he permitted Captain Philip Ritchie to continue to pilot the vessel except that they were cousins and the grievant was a competent Pilot. Yet, he admitted he had fired officers and crew members whose presence aboard the vessel constituted a safety hazard or would be disruptive. The inconsistency of the Company is readily apparent when on the one hand it accuses Captain Philip Rithcie of exercising poor judgment being reckless, violating the Rules of the Road, yet it permits him to pilot the vessel from May 21 to May 29.

The Union maintains that the Company did not comply with the notice requirements of Article VI of the Agreement. This provision requires that a written notice shall be given to an officer at least 72 hours after he or she has been disciplined and a copy of the notification shall be sent to the Association. Verbal notice of termination was given to the grievant on May 29, 1987. Yet, the written notice was not sent to the grievant until June 1, 1987 and not received by Captain Philip Ritchie until June 2, 1987 which was 96 hours after his termination. This failure to comply with the

time requirements of Article VI is grounds for setting aside the discharge.

DECISION

I. ***Captain Philip Ritchie was guilty of "gross carelessness" by his violation of the applicable Rules of the Road.***

Article VI states that no officer shall be discharged except for proper cause. It then proceeds to list the various elements constituting proper cause which includes "gross carelessness". In the Letter of Discharge written by Mr. Kish the reason for discharge was "he violated the applicable Rules of the Road. This act put the Mississippi Queen in danger."

Rule 7, Risk of Collision states:

> "(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. ----"

On May 21, 1987 as the MISSISSIPPI QUEEN was proceeding northbound it passed eight (8) tows which were holding to allow the Harry Mack to clear Mason's Landing. When he was relieved by Captain Philip Ritchie, Captain Davitt told Captain Philip Ritchie that Mason's Landing was "hot". [TR I-200]. Captain Philip Ritchie testified himself that he knew that the Harry Mack was having difficulty. She was stalled at Mason's Landing waiting for the Three Rivers Lady to assist her through the channel. Based on these undisputed physical facts it should have been very apparent to Captain Philip Ritchie that he was incurring a risk of collision by proceeding upriver and attempting to pass the stalled Harry Mack.

The only reason stated by Captain Philip Ritchie for the overtaking action was to save time, possibly four (4) to six (6) hours. However, as Captain Charlie Ritchie pointed out this was the Master's decision. The question of whether to undergo a maneuver to save time or not is strictly up to the Master. Certainly, an effort to save time would not justify putting the MISSISSIPPI QUEEN with its crew and passengers in a hazardous position which was precisely what Captain Philip Ritchie did.

Rules 9, 13 and 34 of the Inland Rules of the Road apply to the situation existing on May 21, 1987. The pertinent part of these rules are quoted as follows:

"RULE 9 - Narrow Channels

(e)(i) In a narrow channel or fairway when overtaking, the vessel intending to overtake shall indicate her intention by sounding the appropriate signal prescribed in Rule 34(c) and take steps to permit safe passing. The overtaken vessel, if in agreement, shall sound the same signal. If in doubt she shall sound the danger signal prescribed in Rule 34(d).

RULE 13 - Overtaking

(a) Notwithstanding anything contained in Rules 4 through 18, any vessel overtaking any other shall keep out of the way of the vessel being overtaken.

RULE 34 - Sound and Light Signals

(c) When in sight of one another in a narrow channel or fairway:

(i) a vessel intending to overtake another shall in compliance with Rule 9(e)(i) indicate her intention by the following signals on her whistle:

--two prolonged blasts followed by one short blast to mean "I intend to overtake you on your starboard side";

-- two prolonged blasts followed by two short blasts to mean "I intend to overtake you on your port side".

(ii) the vessel about to be overtaken when acting in accordance with Rule 9 (e)(i) shall indicate her agreement by the following signal on her whistle:

-- one prolonged, one short, one prolonged and one short blast, in that order.

(d) When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions or action of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. Such signal may be supplemented by a light signal of at least five short and rapid flashes."

The evidence shows that this was a narrow channel. The Harry Mack was fourteen hundred (1400) feet long by two-hundred ten (210) feet wide. She was blocking the channel and other vessels were holding and unable to proceed past her. This was the testimony of Captain Clark. [TR I-68].

Rules 13 and 14 make it quite clear that the overtak-

ing vessel must confirm an agreement with the overtaken vessel that the overtaking is agreed to and notify the manner of the overtaking. If the overtaken vessel does not consent either by radio or whistle signal, then the overtaking vessel is required to stop until the proposed undertaking agreement is effected to.

The Union argues that the Harry Mack was not "underway". This is based upon the testimony of Captain Powell who stated that when a vessel is holding with its engines going waiting for help it is not "underway". [TR II-426]. The argument is that because the Harry Mack was not "underway", then it was not necessary for Captain Philip Ritchie to secure an overtaking agreement from the Harry Mack. The Rules of the Road define the word "underway" as "a vessel is not at anchor, or made fast to the shore, or aground;"

The Harry Mack was not at anchor. She was not made fast to the shore and she certainly was not aground. To the contrary, she was stalled with her engines full ahead, the Miss Shirley pushing full ahead to hold the Harry Mack against the current. The passage through the channel at Mason's Landing was only being delayed until she could get the assistance of the Three Rivers Lady to push her through. Clearly, the Harry Mack was "underway".

There is considerable conflict as to whether Captain Clark gave Captain Philip Ritchie consent to pass. Captain Clark testified that he told Captain Philip Ritchie that it was not safe to pass when Captain Philip Ritchie asked for permission to go by. [TR I-71]. He stated he was not sure he could hold what he had. Finally, he told Captain Philip Ritchie when he said he was going ahead, "if you do, you're doing it on your own. I do not agree to it." [TR I-71]. In his

further testimony he stated that he did not agree for the MISSISSIPPI QUEEN to overtake him because it was unsafe. [TR I-81].

Captain Davitt testified that Captain Clark of the Harry Mack said, "I prefer you wouldn't. I am not sure I can hold her in this current." [TR I-203]. In Captain Davitt's opinion Captain Philip Ritchie violated the Rules of the Road because he did not have permission to overtake. [TR I-245].

Mr. Weber, the Mate on watch, testified that Captain Clark told Captain Philip Ritchie it was not a good idea to overtake her. He was having trouble holding his tow and he might top. [TR I-495]. It was his opinion that there was a "non-agreement' between the two (2) Captains. [TR II-589].

Captain Philip Ritchie testified that he believed that he had consent to overtake. This was based on Captain Clark's final words which were: "Well, you do what you want to, but I rather you didn't." Captain Philip Ritchie was not expressly forbidden to pass. Nor did Captain Clark sound the danger signal after Captain Philip Ritchie had given him a two (2) whistle signal that he was going to pass.

Even taking the position most favorable to Captain Philip Ritchie that Captain Clark's response was ambiguous, this still did not justify Captain Clark's response was ambigious, this still did not justify Captain Philip Ritchie in overtaking the Harry Mack. Rule 34 of the Inland Rules of the Road requires that a vessel that intends to overtake another must propose and obtain an overtaking agreement before commencing the overtaking maneuver. Captain Philip Ritchie has no right to exercise discretion and commence his overtaking maneuver. If there was doubt as to whether an overtaking agreement had been

reached, Rule 34 covers that contingency. It requires that the vessel in doubt shall give at least five short and rapid blasts on the whistle. Certainly by using the phrase, "I'd rather you wouldn't", Captain Philip Ritchie could not construe this as consent. There was certainly some doubt as to whether Captain Clark was agreeing to the overtaking. This was particularly true in view of Captain Clark's statement that overtaking would be unsafe and that his tow was in danger of topping.

Captain Philip Ritchie violated the Rules of the Road by proceeding to overtake the Harry Mack without having an agreement to do so.

The Union argues that the incident was caused by an absence of Aids to Navigation in the form of black buoys which should have been placed on the left descending bank of the Mississippi River or to the port side of the MISSISSIPPI QUEEN. It was the absence of these buoys which cuased the MISSISSIPPI QUEEN to strike either a submerged bluff or a sand reef causing the topping to occur. The Union argues that therefore the topping was not caused by any negligence of Captain Philip Ritchie.

But Captain Philip Ritchie testified that on prior trips this particular area had been marked by black buoys. He, by simple observation, could have observed that the black buoys were not present. This meant that he could not precisely tell the width that he had to safely pilot the port side of the river at Mason's Landing. Realizing that the buoys were not present, which should have been present, that the Harry Mack was in a stalled position, that Mason's Landing was "hot", that eight (8) tows were holding, Captain Philip Ritchie used poor judgment in attempting to overtake the Harry Mack.

II. ***Captain Philip Ritchie was the victim of disparate treatment which requires setting aside the discharge.***

It is a basic principle in arbitration that discipline should be administered in an equal and evenhanded manner. As the Arbitrator said in *Dunfy Hotel Corporation,* 80 LA 1161, 1171 [Bard 1983] setting aside a discharge:

> "---The discipline applied to the Grievant was inconsistent with discipline given to other employees guilty of equal or more serious offenses."

A striking example of unequal treatment exists when the discharge of Captain Philip Ritchie is compared to no discipline taken in the collision involving the MISSISSIPPI QUEEN and the M/V Crimson Glory on December 12, 1985. The collision caused and excess of $1,000,000.00 in damages. [TR I-511]. The incident received bad publicity. This is reflected in a story in the *Waterways Journal* issue dated September 21, 1987 which stated:

> "MQ Pilot Faulted For 1985 Mishap
>
> A 21-month investigation into the collision of the Mississippi Queen and the towboat Crimson Glory on December 12, 1985, has concluded that the pilot of the excursion vessel was at fault for the mishap, which resulted in the grounding of the Mississippi Queen on a Mississippi River sandbar and forcing evacuation of more than 400 passengers and crew. Investigation of the incident showed that there was

fault on the Pilot of the MISSISSIPPI QUEEN. This was made clear by the report of the Coast Guard reguarding the cause of the collision.

> "was the failure of the pilot of the Mississippi Queen to take adequate precaution to keep clear of the Crimson Glory during an overtaking situation. Contributing causes or the casualty included excessive speed on the part of the Mississippi Queen, the failure of the pilot of the Mississippi Queen to correctly assess the effect of the strong river currents and eddies on his vessel. . .DQX7, p.1"

The National Transportation Safety Board concurred in Commandant's finding of probable cause saying that:

> ". . .the probable cause of the collision between the Mississippi Queen and the Crimson Glory and its town was the decision by the Mississippi Queen's pilot about 8 minutes before the collision to overtake the Crimson Glory at a sharp bend in the Mississippi River while the tow was crosswise in the river. . ." DQXl, p. 50.

Mr. Fahey denied that there was any disparate treatment in discharging Captain Philip Ritchie and imposing no discipline against Captain Ruben Williams or Captain Charles Ritchie for the reason that the pilot in the Crimson Glory incident did not violate any Rules of the Road nor was he wreckless. But a reading of the reports of the Coast Guard as well as the National Transportation Safety Board shows that the pilot did violate Rules of the Road just as the Arbitrator has found Captain Philip Ritchie did in the instant case. Captain Williams undertook the risk of collision by attempting to overtake the Crimson Glory in a sharp bend in the Mississippi River. This is comparable to Captain Philip Ritchie proceeding to overtake the Harry Mack knowing the current was "hot" and that other tows were holding up because of the hazard in attempting to overtake the Harry Mack.

There was the incident where in the mid-1980's Pilot Palmor was navigating the Delta Queen at Lock 24, Clarkville, Missouri. He passed through a lock with a wide open dam in flood conditions and lost control of the vessel. There was no Captain or Mate assisting in the wheelhouse. The vessel went broadside against the dam causing damage to the Delta Queen. There was no discipline taken against either the Pilot or Master. [TR II-170, 175].

On August 5, 1985, Captain Hargrove grounded the Delta Queen. No discipline was imposed. [TR II-163].

The Company has not enforced applicable rules and regulations as it insists on strictly doing in the case of instances where the Company used unlicensed pilots over waters for which the Pilot had not been licensed. Pilot Hargrove piloted on the Tennessee River on June 13, 1985 aboard the Delta Queen without the proper pilotage license. Captain Carr piloted the Mississippi River above the Jackson Barracks Bridge when his license extended only to the bridge itself. [TR II-163]. The Certification of Inspection for Passenger Vessels requires Pilots to be properly endorsed for the waters over which they are navigating the vessel.

Not only is there present in this case the element of disparate treatment of Pilots and Masters for collision or groundings where one of the Company's vessels was damaged, but there is the evidence that Captain Philip Ritchie was considered to be a very competent Pilot. [TR I-478. He had worked for the Company for two (2) years free of discipline. [TR II-14-17]. Captain Philip Ritchie had never been disciplined for navigational judgments in his forty (40) year career in the Merchant Marine. [TR II-147].

When questioned as to how he justified the discharge of Captain Philip Ritchie considering his good record with the Company and his forty (40) years of Merchant Marine service free of discipline, Mr. Fahey stated that this was meaningless in view of the reckless action of Captain Philip Ritchie on May 21, 1987 by passing the Harry Mack without obtaining an agreement, thereby endangering the crew and passengers. [TR I-511]. The same statement could be made about the pilot and Master of the Delta Queen in the incident with the Crimson Glory in that there was, according to high governmental officials who investigated the incident, a violation of the Rules of the Road, considerable damage to the vessel, and the evacuation of passengers aboard the vessel after she grounded.

It is unfair and unjust to impose the severe penalty of termination upon Captain Philip Ritchie while other responsible Pilots and Masters who are navigators have been guilty of similar offenses yet received no penalty. Because of this disparate treatment, the Arbitrator has concluded that discharge is too severe a penalty in this case.

III - ***Captain Philip Ritchie was not denied due process.***

The Union argues that the due process rights of the grievant were violated because Captain Philip Ritchie was not given the seventy-two hour written notice as required by Article VI.

There is no merit to this argument. The letter of discharge was dated June 1, 1987 which was seventy-two hours after the grievant had been verbally notified of the discipline. Article VI does not say that the written notice must be received within seventy-two hours.

Even if the seventy-two hours interpreted to mean receipt of notice within that time period, the difference of twenty-four hours in receipt of notice is too minimal to constitute a denial of due process.

AWARD

The Union grievance is sustained in part and denied in part.

I. Captain Philip Ritchie was guilty of "gross carelessness" by his violation of the applicable Rules of the Road.

II. Captain Philip Ritchie was the victim of disparate treatment which requires setting aside the discharge.

III. Captain Philip Ritchie was not denied due process.

The Company shall immediately reinstate Captain Philip Ritchie to full employment and restore all lost seniority. In view of Captain Philip Ritchie's violation of the Rules of the Road, back pay and fringe benefits shall be restricted to the period May 29, 1987 to November 30, 1987.

The Arbitrator will retain jurisdiction of this case to implement the award if required to do so.

/s/ illegible

IMPARTIAL ARBITRATOR

New Orleans, Louisiana
August 4, 1988